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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 731

LIBRARY
SUPREME COURT, U. S.

KENNETH R. JONES,

Petitioner,

—v.—

THE STATE BOARD OF EDUCATION OF AND FOR THE STATE OF TENNESSEE, and its members ERNEST C. BALL, THOMAS M. DIVINE, DALE GLOVER, EDWARD L. JENNINGS, JAMES H. JONES, JR., E. H. KENNEDY, MRS. B. A. MCDERMOTT, D. M. SPOTWOOD, F. THORNTON STRONG, J. FRANK TAYLOR, MRS. SAM WILLIAMS; TENNESSEE AGRICULTURAL AND INDUSTRIAL STATE UNIVERSITY FOR NEGROES, its President, WALTER S. DAVIS, and its FACULTY ADVISORY COMMITTEE, and the members thereof JOSEPH A. PAYNE, CARL CRUTCHFIELD, A. V. BOSWELL, G. M. SAWYER, GEORGE DAVIS, R. N. MURRELL, LEWIS HOLLAND, JAYME WILLIAMS, MRS. M. B. CROOKS, JAMES M. CONLEY; J. HOWARD WARF, as Commissioner of Education; and BUFORD ELLINGTON, as Governor of Tennessee,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 407 F.2d 834 (6th Cir. 1969) and appears at pp. 208-10 of the Appendix. The opinion of the United States District Court for the Middle District of Tennessee is reported at 279 F. Supp. 190 (M.D. Tenn. 1968) and appears at pp. 183-206 of the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit affirming the district court's dismissal of petitioner's complaint was entered on February 19, 1969. The three

plaintiffs below filed a petition for certiorari on June 19, 1969 (after a thirty day extension of time had been granted) and on October 13, 1969 this Court ordered that the writ be "granted, as to petitioner, Jones. Certiorari denied as to other petitioners." 90 S. Ct. 145. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a university's student conduct regulations proscribing "Disrespect" and "any other infractions . . . that require severe disciplinary action" are unconstitutionally vague and overbroad under the first and fourteenth amendments of the Constitution.

2. Whether a university violated its student's right to freedom of speech, as guaranteed by the first and fourteenth amendments of the Constitution, by dismissing him for handing out a leaflet.

3. Whether due process was violated when the members of the tribunal had initiated, investigated and drawn the charges and it was their practice to also act as witnesses, and the reviewing person was an intensely interested party and a sharply controverted witness.

4. Whether the disciplinary proceedings violated the due process clause in that notice was deficient in the following respects: (a) there was inadequate time to prepare the defenses of the charges; (b) an uncharged finding was made; (c) the charges and pre-hearing procedures gave inadequate notice of the nature of the case.

Constitutional Provisions and Regulations Involved

Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. *U.S. Const.* amend. I.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *U.S. Const.* amend. XIV, § 1.

Regulations (from the *Student Handbook*[1] 17-18):

Offenses Requiring Severe Discipline:

> . . . . . .
>
> Disrespect for University authority.
>
> . . . . . .
>
> Any other infractions of standards of conduct that require severe disciplinary action.

[1] This publication (herein cited as "HANDBOOK") is Pl. Exh. 29 (admitted at T. 32, 238). It appears in the Appendix beginning at A. 177 but is not paginated into the Appendix; its original page numbers will be cited.

Statement of the Case

Petitioner Kenneth R. Jones was dismissed from the Tennessee State University[1] (herein sometimes referred to as the "University"), for having engaged in speech activities.

The University Proceedings Prior to Hearing

Jones was first notified of disciplinary action by a telegram dated June 8, 1967 signed "Faculty Advisory Committee" (the "F.A.C.") (A. 17). The F.A.C. had not, however, formally met to take action (A. 123-28). The telegram merely advised Jones that he had "not been cleared to enter the University for summer study" and that a letter would follow.

He subsequently received a form letter dated June 21, 1967 (more than a week after the beginning of the summer session when his efforts to register had been rebuffed (A. 42-43)), which stated that the committee had "voted unanimously to deny you the privilege" of continuing your

[1] At the time the University was officially "The Tennessee Agricultural and Industrial State University for negroes [sic] at Nashville." TENN. CODE ANN. § 49-3201. After the court in *Sanders v. Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968) ordered that a desegregation plan be filed with regard to this and other universities, the foregoing code section was amended to change the name to "Tennessee State University at Nashville". Pub. Acts of Tenn. of 1969, ch. 302 (May 8, 1969). Its statutory "function" remains unchanged: "to train negro [sic] students in agriculture, home economics, trades, and industry, and to prepare teachers for the elementary and high schools for negroes [sic] in the state." TENN. CODE ANN. § 49-3206.

[2] Thus the stage was wrongly set. This University had already been through litigation on the rights of its students. See *Knight v. State Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961). Its administrators might have been especially sensitive to the

education at this University for an indefinite period" (A. 18). The letter went on to charge

> Involved in worm-on-plate incident in cafeteria in an alleged attempt to discredit cafeteria workers; fraud and conspiracy. Participated in riot.

It stated that the F.A.C. was "providing an opportunity for you to appear before it for a special hearing at which time you may show cause why this action should not be taken." It took the rest of the summer for the University to furnish Jones' attorney with a detailed specification of charges[1] (A. 104-10). More detailed charges (A. 27-28) for the most part unrelated to those in the June 21 notice of dismissal were provided on September 14. The hearing before the F.A.C. was conducted on September 19[2] (A. 127).

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teaching that education is more right than privilege. See *Brown v. Board of Education*, 347 U.S. 483 (1954); *United States v. Jefferson County Board of Education*, 372 F.2d 836 (1966), aff'd en banc, 380 F.2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

[1] Apparently however this action had already been taken—Jones' academic transcript bears the notation "Disciplinary dismissal, suspended indefinitely 6-5-67" (A. 17). The University's difficulties in accommodating what it was actually doing with its written records cropped up again and again; for example at the district court hearing it was revealed that the F.A.C. chairman whose name was signed to the June 21 actions had not signed them, had been out of town at all relevant times, and knew nothing about those proceedings (A. 93-103). The references to the "unanimous" vote was easily explained—there had only been one dissenting vote on anything in the last 50 cases (A. 102).

[2] The F.A.C. chairman did not respond to counsel's requests because "I have never had the position of an attorney . . . I was of the opinion that he was just a lawyer that had no business in the committee at all . . . [But] I was extremely wrong" (A. 105).

[3] The transcripts of all three plaintiffs' F.A.C. hearings are Pl. Exh. 1 (admitted P. 3). Portions of the Jones transcript are

Offers of earlier hearings never came to fruition because the detailed charges had not been provided (T. 350-57). When they were provided the opening of the next term was imminent (Jones F.A.C. 24).

At the hearing in the district court witnesses (T. 174-200, 283-329, partially reproduced at A. 53-60, 88-97) were presented and offers of proof (A. 130) were made of additional evidence that would have been presented to the F.A.C. had there been adequate time to prepare.

The only charges on which the F.A.C. ultimately made affirmative findings were based on the two offenses listed under the heading "Offenses Requiring Severe Discipline," quoted p. 3 *supra* (A. 119-21).[6]

Although the president of the University repeatedly emphasized the importance of following the *Handbook* to the letter (see, *e.g.*, A. 68-69, 79, 82,[7] 86-87), the University did not follow it. The *Handbook* requires that discipline cases be first brought before the Men's Senate; this was not done (Handbook 16; A. 43-44, 73-74; T. 138-39). Instead, the University followed its "usual policy" of making the "dismissals before offering the students a hearing" (A. 75).[8]

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in the Appendix (A. 137-66). References to other parts of these transcripts will include the respective plaintiffs' name, *e.g.*, "Jones F.A.C. 1."

[6] The chairman of the F.A.C. testified explicitly that only these two regulations were relied upon.

[7] He felt that an example of "destruction" would be "something that would make us violate the student handbook . . . ."

[8] Most of the seventy or so telegrams and letters of dismissal (A. 113), including those sent to Jones, were sent as the result of

The F.A.C.'s taking of proof began with its chairman stating: "At this point we would like to ask Mr. Jones to respond to the first charge" (A. 142).

The F.A.C. Charges, Findings, and the Evidence

A few days after the completion of the September 16 F.A.C. hearing, the committee issued its "Report of Findings and Decision" (A. 29-31).

The September 14 charges and the specific finding were:

Charges (A. 27-28)

You are charged with conduct unbefitting a University student in that during the school year you created a disturbance in the cafeteria located within Jane E. Elliott Hall. During that time a "worm" which obviously had not been processed through the kitchen was said to have been found in some food served to one of your fellow students. Your actions on that occasion exemplify a disrespect for University authority.

Specific Finding (A. 30-31)

We, the Committee find that Mr. Jones has seized upon the opportunity on different occasions to promote unrest on the campus by such actions as distributing literature designed for that purpose. At the hearing he demonstrated his indifference to the truth by denying that he passed out such literature despite positive statements by cafeteria personnel and the President of the University that he had done so. We have no

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the student's name being on the "Undesirable List" (Pl. Exh. 37, admitted A. 112), an annual compilation of undesirables prepared by the Dean of Students (who is a member of the F.A.C.) (see A. 715-16, 123, 127-28). The "Offenses" listed thereon range from "failed room inspection," and "Black Power advocate" through "Threatened to shove penis in mouth of [name omitted]. Three demerits" to "shooting Mr. Harold Harris in the area of WRC."

Charges (A. 27-28).

You are charged with distributing literature and soliciting students, all of which was designed to boycott the registration at the University for the Fall Quarter of 1967. This occurred during the Summer of 1967.

You are charged with having been recently arrested by the Nashville Metropolitan Police Department at Fortieth Avenue and Clifton Road upon a charge of disorderly conduct. Pursuant to that arrest, you were convicted and fined $50.00 by the Judge of the Metropolitan City Court.

You are charged with continuous disrespect for University authority, all of which is a violation of Chapter 4, Student Handbook, "Discipline and Honor", pages 17 and 18, and Chapter 3, "Conduct", page 11.[9]

Specific Finding (A. 30-31)

doubt that this student did not tell the truth when he appeared before us in this regard.[10]

[9] Although this last paragraph appears to be a separate charge, and at first was so treated (see A. 147), the University's counsel finally explained that, "I think the last statement was designed so as to pinpoint the specific regulation which we say he is in violation of, which would give the committee authority to act, period" (A. 148).

[10] While it is extremely doubtful that this finding is correct, it cannot in any event serve as a basis for dismissal as he was never charged with dishonesty. The district court, implicitly recognizing this, did not rely on this finding to uphold the dismissal. But had it not been for this uncharged finding, the penalty may well have been less severe.

The finding continued with the imposition of the University's ultimate penalty.[11]

> After considering all of the matters before this Committee, we feel that Mr. Kenneth Jones has violated the rules of conduct governing students at this University to such an extent that he should be suspended for an indefinite period.

While the other two plaintiffs, represented by the same counsel relying on the same first amendment freedoms, freely admitted handing out numerous leaflets (T. 94, 146), and Jones admitted handing out another leaflet,[12] he denied handing out Pl. Exh. 6 (A. 175, admitted T. 26), the only leaflet in the case that could be said to be designed to "boycott the registration" (Jones' testimony on the matter is at A. 44-46, 146, 153, 155-65).

It is apparent that Jones was actually disciplined for distributing the leaflet he said he distributed. This appears from the testimony against him at the F.A.C. hearing (and indeed from the findings)[13] and in the district court. One of the two witnesses against him testified that the boycott leaflet in question was handed out before it even existed (A. 149-52).[14] The other witness (the President of the University, hardly a person who had to be shielded from controversial ideas) could well have been mistaken as to which

[11] All disciplinary dismissals are "indefinite suspension" (A. 74).

[12] Pl. Exh. 5 (A. 168, admitted T. 26), a more moderately worded newsletter having nothing to do with the University.

[13] *I.e.*, the omission of reference to the threatened boycott and the inclusion of reference to the uncharged "different occasions." See p. 7, *supra*.

[14] See also Brooks F.A.C. 58.

leaflet was which he could not recall when Jones handed it to him (A. 134-35) and he refused to even look at it in the district court.[9]

But regardless of which particular leaflet was handed out,[10] the more important point is that there is absolutely

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[9] Q. Dr. Davis, I'm going to hand you a two-page mimeographed document that's stapled together. Is this the piece of literature? A. That's what I'm talking about.

Q. Would you like to look at it, sir? A. No.

Q. Can you recognize it without reading it, sir? A. Yes.

Q. Do you feel that this piece of literature was harmful to the university? A. I know it was, could have been.

Q. How, sir? A. The intent was to generate harm, to block the university and get students all stirred up and not wanting to register.

Q. Let me offer this to you again, and point to language that is attempting to— A. No, I'm not.

Q. Are you refusing to answer the question? A. I'll answer it, but I'm not going to read it. (A. 77-78.)

The President also refused to read or point out potentially disruptive portions of the literature handed out by petitioner Booth (A. 80-81).

The foregoing is also indicative of the nature of the president's entire testimony. It is found at A. 61-88, 134-35, Booth F.A.C. 12-19, 58-68, Brooks F.A.C. 20-26, 40-43, 68-74. It was generally evasive, biased, non-responsive, and at times incoherent. His testimony that Booth was the first student in 50 years to call him an Uncle Tom (Booth F.A.C. 68 ¶ 27-30) was thoroughly discredited and the district court found the contrary as a fact (A. 301). The inconsistencies in his testimony against Brooks were so glaring that counsel for the university stated: "Let the record show that Dr. Davis is not swearing to any of this." (Brooks F.A.C. 23). It would be better if the testimony could be ignored as an unfortunate aberration, but since without it there is no case at all for Jones' dismissal, it is discussed.

[10] The controversy is preserved so that this Court may "analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Norris v. Alabama*, 294 U.S. 587, 590 (1935). *See Pickering v. Board of Educ.*, 391 U.S. 563, 578 n. 2 (1968); *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939) ("independent inquiry and determination of the disputed facts . . ."). Cf. *Estelban*

no testimony that actual disruption occurred or that there was interference in any way with school routine. There was no student response to the literature.[17]

Since the district court hearing did not take place until several months after the alleged leafleting and well into the next school term, and since the University took no particular action to stop the distribution, it is unnecessary to consider whether interference could have reasonably been forecast.[18]

The Conflicting Interests and Confusion of Functions

The President of the University reviews the findings of the F.A.C. "to determine whether I feel I should veto the action."[19] (A. 69) He appoints the members of the F.A.C. (T. 218) He, subject to approval of the State Board of Education, is responsible for selection and employment of administrative personnel. (A. 68)

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v. Central Missouri State College, No. 19,585 (8th Cir. Aug. 28, 1969) (dissenting opinion).

[17] The F.A.C.'s Acting Chairman shed some light on their concern:

> ". . . students going about their normal activity would see somebody passing out literature . . . they would stop to read to see what this is all about, when they may have been addressing themselves to academic pursuit (A. 121-22).

[18] Even so there was no testimony to this effect except vague generalities; the President declined to even point out what part of the leaflet might be harmful (A. 78) although it ranged over several subjects.

[19] The standards of review "are in relationship to my contract with the Southern Association, with the State Board of Education . . ." but could not be explained because "that would take three or four years in school to do that" (A. 69).

At least five of the nine members of the F.A.C. are administrators; the rest are faculty members. (See A. 66-67) Four members are also members of the President's Executive Committee. (A. 67)

The President was one of the two witnesses testifying on the leafleting charge at the F.A.C. hearing against Jones (the testimony of the other witness being rendered incredible by her assertion that the leaflet was passed out some weeks before it was even written. (A. 147-52))

His testimony was sharply controverted by Jones. (A. 146, 153, 155, 161)

It wasn't necessary for the President to participate in all of the F.A.C. proceedings "because everything I know they knew it." (A. 84) Before the F.A.C. met formally the President discussed the students to be disciplined "[m]any times" (A. 85), referring to them as "problem children."

Contrary to his usual practice at the start of the school year the President had not appointed new F.A.C. members. (A. 63)

He did not reverse the findings of the F.A.C.

All disciplinary charges were collected, compiled, managed, investigated, and initiated by the Dean of Students or his staff.

The initial charges had been brought based on the annual "undesirable list" (n. 8, p. 6, *supra*) prepared under the auspices of the Dean of Students, who was acting as chairman of the F.A.C. (A. 116, 127-29) The list had been compiled by a personnel committee, the membership of which overlapped that of the F.A.C. (A. 124-27) The F.A.C. had

already compiled materials to "take an in-depth look at the student and his behavior . . ." (A. 113) It was the F.A.C. itself which had made the initial decision to dismiss the students.

Then the F.A.C. delved further.[20] They composed with the assistance of their counsel, the final charges of September 14th. (A. 110, 118) In so doing they dropped two of the three June charges against Jones, made the third more detailed, and added at least two[21] more charges relating to matters which arose after June.[22]

The Assistant Attorneys General who appeared at the hearing were the F.A.C.'s counsel, not independent prosecutors. They were introduced as "representing Tennessee A&I University" (Jones F.A.C. 3) and participated in drafting the findings. (A. 122)

It was the F.A.C. that called the prosecution witnesses and presented (to itself) documentary evidence. (A. 145-49,[23] 153; Jones F.A.C. 20, 45-46)

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[20] And claimed, through their counsel, the prerogative of judging their own findings: "the person who saw the conduct . . . knows more about what he saw than some third party" (A. 167, see A. 166).

[21] The number would be three if the boiler-plate charge of "continuous disrespect for University authority . . ." is considered as a separate charge (*see supra*, p. 7).

[22] As to the other two plaintiffs, a total of four June charges were dropped, three were made more detailed, and seven new charges (mostly arising before June) were added.

[23] The acting chairman announced: "We have called Mrs. Knight as one who actually saw Kenneth Jones passing out leaflets . . . I present Mrs. Knight for any questions that anybody would like to ask" (A. 148-49). After Mrs. Knight proceeded to testify that the leaflet was handed out before it existed, an F.A.C. member commented on her testimony in an apparent attempt to rehabilitate her or at least to minimize the effect of the discrepancy. (Jones F.A.C. 87).

The F.A.C. members on occasion stepped down from their "bench" to give controverted testimony against other students. (See Booth F.A.C. 74, 77, 78-81, 94-95; Brooks F.A.C. 18-19,[24] 40-49) At least five of them had witnessed events in question. (See Booth F.A.C. 60, 65, 68-69, 74; Brooks F.A.C. 15, 69-73) The President, too, testified vigorously against these other students. (A. 84-85; Brooks F.A.C. 24-25; Booth F.A.C. 12-18, 65-66)

At the opening of the hearings the F.A.C.'s counsel gave notice that it would not be expected to confine itself to the record:

> We can't possibly visualize this committee's closing its eyes to the things he has done or hasn't done, if anything, during the summer of 1967. It would be impossible in the first place. And in the second place, I don't think it would be appropriate. (A. 142)

At the opening of the Brooks hearing this position was developed in considerably more detail (A. 166-67), including:

> We cannot disrupt the procedure long followed in this school because it develops that a student makes his remarks against those who sit in judgment of students. (A. 166)[25]

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[24] Dean Sawyer opened his testimony

> Ladies and gentlemen, I am a personal witness to the event as related by President Davis, and I became so incensed over the behavior of Mr. Brooks

[25] The leaflet Jones allegedly handed out generally disparaged the University's administrators (*i.e.*, the President and five of the F.A.C. members) as "puppet administrators" and "trembling, powerless idiots" who had "sold out the student body" in the interest of the "great white fathers downtown" (A. 175-76)

The most telling blow struck after the hearing had apparently concluded. The F.A.C., seemingly surprised that Jones had offered a defense, at this point elicited the testimony of its superior, the President of the University:

Dr. Payne [Chairman]: Is there anything further in this case?

Mr. Roberts [F.A.C. attorney]: We have nothing further.

Mr. Creswell [Jones' attorney]: May I ask just as a bit of curiosity as to what is going on now? Are we finished with this hearing?

. . . . .

Dr. Payne: We have in this regard just one more witness who well [sic] testify here. . . . I certainly feel that we ought to get testimony from this witness.

Mr. Creswell: I again note the same exception to Dr. Davis as a witness, and also request that, even though that exception refers to prior notice, I would just back that up in that at the beginning of this hearing you had some idea, I imagine, that you were going to call Dr. Davis and various other people. The hearing has come to an end twice; and twice you have decided that you are going to go out and get another witness.

Dr. Payne: We didn't know you were going to present telegrams and affidavits from Taliaferro.

Mr. Creswell: Just one.

Dr. Payne: President Davis and members of the committee, I hold in my hand a document that was circulated around the campus. I should like for you to take a look at this document. Have you seen it before,

and is there anything else you would like to say about it before the committee?

* * * * *

President Davis. Yes, I have seen this. Mr. Jones gave me this [reached me one out of his own hand] when I was on my way to my office not too many weeks ago. He personally reached me one, personally just as I came into this building, parked on this side. He reached me one personally. I went upstairs and read it. (A 153-54)

Summary of Argument

The availability of the Constitution to students grew with the Civil Rights movement. The seminal case of *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), involved Negro students expelled from a Negro college for their civil rights activity. *Dixon* was followed in *Knight v. State Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961), where students at this same University were reinstated for lack of procedural due process in their dismissals for civil rights arrests.

These were procedural due process cases and, as Mr. Justice Frankfurter has said: "The history of liberty has largely been the history of observance of procedural safe-

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[1] Indeed it is this Court's affirmation of the importance of education in *Brown v. Board of Educ.*, 347 U.S. 483 (1954) that underscores the magnitude of the rights involved. *See Sipuel v. Board of Regents of State Education Comm'n*, 332 U.S. 631, 634 (1948) (Clark, J., dissenting).

Actually *State ex rel. Gaertner v. Board of Ed.*, No. [illegible], 61 Neb. 532, 85 N.W. 861 (1901) appears to be the first case to assert substantive and procedural rights. It has been neglected for many years.

"[T]he world is much with the modern state university." It is in no sense merely an enclave of scholars. Therefore, its non-academic regulations in areas of constitutional concern should be held to the same constitutional standards as, for example, those of a city or town.

Analysis of the particularity with which the University regulates the non-first amendment around-the-clock affairs of its students and the affairs of its faculty shows that narrow and precisely drawn regulations are well within its competence.

Further, the analysis, particularly as it focuses on this and other state Negro universities, shows the potential for and likelihood of abuse of vague and overly broad regulations.

And unquestionably deprivation of a university education, the money invested in that education, the probability that disciplinary dismissal will make it difficult to enter another school, the possibility that the stigma will cause problems in entering certain employment and professions, in addition to the deprivation of first amendment rights, is more serious than the rather minor costs of a misdemeanor prosecution.

Professor William W. Van Alstyne, perhaps the leading authority on student rights, speaks to this point in his

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[1] *Soglin* v. *Kauffman*, 295 F. Supp. 978, 988 (W.D. Wis. 1968), *aff'd*, No. 17,427 (7th Cir. Oct. 24, 1969) (applying vagueness doctrine).

[2] Clark Kerr, former President of the University of California, has devoted an entire book to explicating the worldly role of the university; it is appropriately titled THE USES OF THE UNIVERSITY (1964). The relationship of the modern university to society is also explored in J. K. GALBRAITH, THE NEW INDUSTRIAL STATE 282-95, 370-77 (1967).

article, *The Student as University Resident*, 45 Denver L.J. 582, 592 n. 23 (1968). He cites adverse decisions, including the district court's decision herein, and continues:

> Despite the opinion in these cases, I cannot believe that they are soundly reasoned. They are . . . highly reminiscent of A.P. Herbert's hearty spoof in *Rex* v. *Haddock* in which the accused had jumped into the Thames purely for fun, and . . . . The court stated:
>
> > Citizens . . . should be careful to bring these [unusual] actions into one of the recognized categories of crimes and offenses . . . .
>
> More seriously, vagueness and ambulatory administrative discretion as well as lack of notice of rules are constitutionally vicious, even aside from whether or not an individual had reason to suppose that he might subsequently be punished for his proposed conduct. The general problem is reviewed very well in Amsterdam, *The Void for Vagueness Doctrine*, 109 U. Pa. L. Rev. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 Cornell L.Q. 195 (1955).

Another commentator has pointed out that if unspecific rules are permitted, students have not gained much

> from the decisions requiring procedural safeguards to be observed. It will do a student very little good to be given every protection of procedural due process ever thought of anywhere if, in the end, he may be expelled because the tribunal is free to apply a subjective judgment about what is acceptable conduct. Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1069 (1969).

The analysis of the university may also be brought to bear on Jones' second substantive contention—that he cannot constitutionally be dismissed from the University for handing out a leaflet. The analysis, both as to the nature of the university and its propensity to stifle dissent[*] is especially pertinent to this contention that non-academic speech activity on a college campus should be evaluated against the clear and present danger test. No lesser standard, by the time it has filtered down through the lower courts, state politicians, and school administrators (who, in their upper echelons, are also state politicians) will work.

Procedurally Jones' claims fall into two categories, overlaid by a third problem. First, the tribunal (the F.A.C.) that heard his case was essentially inquisitorial and inherently biased and his appellate review was by the chief witness against him—the President of the University. Various F.A.C. members, particularly its Acting Chairman, had had extensive personal and official involvement with the case. They acted as investigators, charge bringers, indicters, prosecutors, jurors, and judges.

Second, he was given inadequate time to prepare his case (two days vs. three months consumed by the University in getting its charges and case in order) and inadequate notice of charges and of evidence. The charges either should have been made more detailed or he should have been afforded discovery.

Finally, the whole proceeding was infected by his dismissal in part for an uncharged offense—that he hadn't

[*] The added factor that school administrators are rather handily able to avoid being bound by *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) will also be developed.

told the truth at the hearing. It appears that in making this finding the F.A.C. relied on the knowledge or supposed knowledge it acquired during its investigation (or prosecution) or that it deferred unduly to testimony of its superior, the President.

There have been several recent informal codes defining student university relationships with emphasis on the constitutional type safeguards. Most widely known and endorsed is the *Joint Statement on Rights and Freedoms of Students*, 53 A.A.U.P. Bull. 365 (1967) (herein cited as "*Joint Statement*"). This statement has been approved by the American Association of Higher Education, the American Association of University Professors, the Association of American Colleges, the National Association of Student Personnel Administrators, the National Association of Women Deans and Counsellors and the United States National Student Association.[*]

Recently the Section on Individual Rights and Responsibilities of the American Bar Association has approved a *Statement of the Rights and Responsibilities of Undergraduate Students* (Nov. 1, 1968) (herein cited as "*ABA Statement*"). It is patterned after the *Joint Statement*. Its comments directly criticize this case for upholding "the practice of permitting an investigating official to sit on the hearing committee and disclose all he knows of the case

[*] The wide academic acceptance private universities are giving that university people do not feel that they should be bound by detailed rules. Further, Professor Charles Alan Wright cites his own experience and the documented experience of others to establish that narrowly drawn university regulations are entirely workable. Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1041 (1969).

ARGUMENT

I.

The Codified Regulations of Tennessee State University Prohibiting "Disrespect for University Authority" and "Any Other Infractions of Standards of Conduct That Require Severe Disciplinary Action" Are on Their Face So Vague and Overbroad as to Violate the Constitutional Guarantees of the First and Fourteenth Amendments of the Constitution.

A. The Nature of the American State University Both Factually and Philosophically Must Be Fully Understood in Order to Properly Determine the Applicability of the Vagueness and Overbreadth Doctrines of the First and Fourteenth Amendments to University Disciplinary Rules.

The District Court's rejection of the contention that university disciplinary regulations must be drawn with specificity was based on "the very nature of the institution and its goals and purposes . . . ." (A. 197) Thus an inquiry into the "nature" of the American state university is pertinent. Such an inquiry in *Soglin v. Kauffman*, 295 F. Supp. 978, 988 (W.D. Wis. 1968), *aff'd*, No. 17,427 (7th Cir. Oct. 24, 1969), produced the following:

> I take notice that as of October, 1967, some 33,000 students were enrolled on the Madison campus; that many graduate schools, such as those of law and medicine, are situated on the Madison campus; that among

The charges against petitioner Jones also included a reference to a rule prohibiting "Any act in violation of city, county, state, or federal law." Hypothesis 18. This rule was not relied on. See testimony of the Acting Chairman of the DAC (A. 120).

the colleges, schools, or departments of the university at Madison are those of agriculture, business, engineering, family resources and consumer sciences, industrial relations research, journalism, military science, naval science, pharmacy, and a school for workers; that sources of major portions of its funds, in addition to state tax revenues, are grants from federal agencies and departments such as the Department of Health, Education and Welfare, and the Department of Defense; that the university has close and useful and productive ties to industry, agriculture, and organized labor in Wisconsin and elsewhere; that the university owns or controls a large area of land; that it owns or controls many buildings, some large, which are used as residences, classrooms, laboratories, offices, meeting places, restaurants, gymnasiums and playing fields (intramural and intercollegiate), and research centers; and that it maintains its own police force, hospital, parking lots, and similar functions and facilities.

I take notice that for some years the mean age of American college and university students has been more than 21 years, and that among them are more over 30 years than under 18. [footnote omitted]

I take notice that particularly in recent years the universities have become theaters for stormy and often violent protest over such matters as war and peace, racial discrimination in our cities and elsewhere, and the quality of American life; that this phenomenon adds new and unanticipated dimensions to the regulation of conduct in the universities; and that those charged with governance of these institutions have been struggling to preserve the many competing values involved.

I take notice that in the present day, expulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term, may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding.

The world is much with the modern state university. Some find this regrettable, mourning the passing of what is said to have been the old order. I do not share this view. But whether the developments are pleasing is irrelevant to the present issue. What is relevant is that the University of Wisconsin at Madison may continue to encompass functions and situations such as those which characterized a small liberal arts college of the early 20th century (of which some no doubt exist today), but that it encompasses many more functions and situations which bear little or no resemblance to the "models" which appear to have underlain, and continue in some cases to underlie, judicial response to cases involving college or university discipline. What is relevant is that in today's world university disciplinary proceedings are likely to involve many forms of misconduct other than fraternity hazing or plagiarism, and that the sanctions imposed may involve consequences for a particular student more grave than those involved in some criminal court proceedings.

Even though Tennessee State University is not the State's paramount institution, and its 4700 students (A. 62) come nowhere near the 33,000 of the University of Wisconsin, the structure and the function of the University show the same departures from the outmoded model of "a

small liberal arts college of the early twentieth century." *Id.*

1. *Tennessee State University, Its Internal Operation and Regulation*

According to its catalogue,[31] the University is divided into seven major areas:

Graduate School
School of Agriculture and Home Economics
School of Arts and Sciences
School of Education
School of Engineering
Department of Aerospace Studies[32]
Division of Agriculture and Home Economics
Extension Services Catalogue

There are sixteen departments in the graduate school and twenty-six undergraduate departments. *Id.* Hundreds of courses are offered. *Id. passim.*

Physically, the University is a massive undertaking. Its 450 acre campus encompasses more than 30 buildings (not counting an 18 building poultry plant) as well as farm land

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[31] TENNESSEE STATE UNIVERSITY CATALOGUE, BULLETIN, ANNOUNCEMENTS FOR 1969-70, at 4 (March, 1969) (herein cited as "CATALOGUE"). This and other University publications should be judicially noticeable as published works and/or the regulations of a state agency, but may not be readily accessible by the Court. Accordingly, this CATALOGUE and the publication, TENNESSEE A. & I. STATE UNIVERSITY FACULTY MANUAL, A MANUAL OF RIGHTS, DUTIES, OBLIGATIONS AND PROCEDURES FOR FACULTY MEMBERS (1965) (herein cited as "FACULTY MANUAL") are lodged with the Clerk herewith.

[32] This is ROTC; the University's listing of it on an apparently equal plane with its graduate school may or may not be indicative of its importance.

and pastures. *Catalogue* 23-24. In addition to classrooms and administrative offices, the University has a computer center, several auditoriums, a theater, swimming pools, bowling alleys, a wide range of other recreational facilities, a 120,000 volume library, laboratories, heating plant, nursery school, dairy and horse barns, stock pavilions, farm shops, gymnasium, stadium, student resident halls, private residences, guest rooms, family accommodations, counseling center, meeting rooms, book store, post office, ballroom, cafeterias, coffee shops, game rooms, and a machine shop. *Catalogue* 24-25; *Handbook* 3-4, 19-20, 24.

Administering the plant and ministering to the students and faculty cannot just be done by a few scholars taking time out from their scholarly pursuits.

Functionally, the University operates the nursery school on its Nashville campus and student teaching centers in Chattanooga and Memphis. *Catalogue* 22, 24. It operates a publications office, a health service on a 24 hour basis with hospitalization facilities and a staff of physicians, dentists and nurses, printing facilities, a testing bureau, a vigorous intercollegiate athletic program, communications clinic, a career planning and placement service,[33] electoral government activities, a public relations bureau for dealing with all forms of communications media, a Sunday School, worship services and mid-week meditations, a center for institutional research, student personnel service, a security or police force,[34] a motor vehicle registration and regulation scheme, and a maintenance department (in effect a department of streets, public works, and sanitation for the 450

[33] To which the students are *required* to report. HANDBOOK 28.

[34] The students must defer to night watchmen of this force as "duly deputized" officers. Failure to obey them is said to constitute a "misdemeanor." HANDBOOK 27.

acre urban and rural complex). *Catalogue* 24-33; *Handbook* 6-7, 11, 14, 27-29, 37, 46, 50, 54.

Even in those areas in which upon first thought it would appear that the University is only performing its function of imparting knowledge, it professes to be concerned with a wide range of nonacademic activity. Each undergraduate school introduces its section of the catalogue with a statement of its or the University's aims in this area of instruction. For example:

(a) The School of Agriculture and Home Economics "recognizes that the home and family life are fundamental and primary to the individual and to the survival of our economic structure." *Catalogue* 95. The School accordingly adopts a "philosophy . . . geared toward . . . " such things as "producing and processing more and better agricultural products," "satisfying careers," and "intelligent and respectful participation in the democratic way of life." *Id.*

(b) The Division of Agriculture and Home Economics Extension Services serves the nonacademic community by working "with agencies in rural and urban communities over the state in planning programs for general improvement in five major areas . . . ." *Id.* at 249. It offers the "services of its resource consultants," as "determined by needs of the local community" in fifteen different areas of specialization. *Id.*

(c) The School of Arts and Sciences numbers among its aims the preparation of students "to engage" upon graduation, the gainful occupations of American life." *Id.* at 117.

(d) The School of Education, too, numbers among its purposes "to assist graduates in finding teaching

positions . . . and in advancing to better teaching positions" as well as their "relation and responsibility" to "the economic society." *Id.* at 171. The "General Competencies Sought in General Education" range from "improve and maintain his own health" through "social adjustment through the enjoyment of a wide range of social relationships . . . ", "[d]iscriminate among moral and spiritual values and apply these values . . . ", and "[a]ccept the responsibilities . . . of democratic citizenship" to "an awareness of the greatness of man . . . ." *Id.* at 172.

(e) Additionally, the School of Education renders Public Services, in accordance with "many requests for services from local county and state agencies." *Id.* These services include consultation with local school personnel, conducting special courses and conferences, development and distribution of materials to school personnel, and work with a state-wide testing program. *Id.*

(f) Within the School of Education its Department of Health, Physical Education and Recreation endeavors "to provide opportunities for students to develop a reasonable degree of skill in a variety of leisure-time activities." *Id.* at 203.

(g) The unaccredited School of Engineering stresses that its program too is concerned with the economic well being as well as intellectual attainments of its students. *Id.* at 219. Its descriptions of its curricula in building construction ("carpentry, electricity, drawing and masonry" *id.* at 240) and technical printing state this clearly: "To train young men . . . to make a living . . . ." *Id.* at 240, 242.

(h) And of course the Department of Aerospace Studies (Air Force ROTC) is concerned with securing for its graduates commissions in the United States Air Force. *Id.* at 245.[35]

The University's nonacademic prescriptions pervade every moment of the student's life.[36]

In fact, one unacquainted with the concept of the University as a community of scholars might, upon reading the *Handbook* and the *Catalogue*, conclude that the University's primary function was rule making. To illustrate the minutiae of rule making:

(a) A detailed chart headed "DRESS *What to Wear—Where*" specifies male and female dress for all on and off-campus occasions and activities, including "Swimming," for which the attire is "Swim suits." *Handbook* 13. Students are not allowed out of their quarters unless they and their companions are properly dressed. *Id.* at 31.

(b) The University's marriage procedures are specified. *Id.* at 13-14.

(c) "Our Cafeteria Creed" (mandatory). *Id.* at 19-20.[37]

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[35] Additionally, the Department sponsors 6 non-curricular activities, primarily military but including an "*Angel Flight*. . . . composed of selected co-eds who are interested in enhancing esprit, morale and appearance of the Air Force ROTC Cadet Corps."

[36] "Life, then here at Tennessee State, as it moves on second by second and minute by minute, requires of us the constant exercise of self-discipline for proper moral growth." (HANDBOOK 15) *Cf. Marsh* v. *Alabama*, 326 U.S. 501 (1946).

[37] Including:

"I will take up my tray."
"I will refrain from cutting line."
"I will NOT WASTE food."

(d) 3 separate documents are involved for each undergraduate to gain library privileges, plus a fourth for graduate students and faculty. *Id.* at 21.

(e) The daily comings and goings of all students, and particularly women, are strictly regulated. *Id.* at 29-34.

(f) Women students can ride in automobiles only under certain conditions and only upon being escorted between her residence door and the car. *Id.* at 34.

(g) "The local and permanent resident addresses must be printed legibly and in ink and in full . . . ." *Catalogue* 39.

(h) There is, for writing papers, an "approved style used by the University." *Catalogue* 44.

The University regulates with specificity in every area but that which falls within the ambit of the first amendment.

2. *The University and Its External Relations*

In almost every respect the university has become more like a governmental body, both internally and in its outside relations than an isolated ivory tower of erudition, if ever it was such. The university of today not only has integral connections with and is, of course, supported by government but it is tied to the private sector of our society. Tennessee State University fits this pattern.

A. Connections with Government.

Tennessee State University, like almost all state universities, receives large portions of its income from the

federal government. *Catalogue* 23.[38] Federal aid flows to state universities, from such agencies and sub-agencies as the Department of Health, Education and Welfare, the National Institutes of Health, Department of Defense,[39] National Science Foundation, Atomic Energy Commission, Department of Agriculture, and National Aeronautics and Space Administration. *C. Kerr, The Uses of the University* 53 (1964). The sums involved are substantial. In 1960, for example, higher education received about $1.5 billion from the federal government—a one-hundredfold increase in 20 years. *Id.*

The influences and effects of large quantities of federal money upon the university are diverse. One aspect of these influences reveals a better understanding of the American state university, such as Tennessee State. Almost any judicial opinion on students' rights deals with one or both of

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[38] Federal interest in higher education dates from 1787. That year saw the beginning of endowment of public institutions of higher education with public lands, following the example of the Northwest Ordinance of 1785, which provided land to support public schools at the lower levels. However, this interest was not made effective until the Morrill Land Grant Act of 1862. Then the Second Morrill Act in 1890 supplemented the original land grants with federal grants of funds to support college instruction in specified subjects; these grants continue, and, in fact, have recently been expanded. Federal interest in higher education was further made effective by the Hatch Act in 1887, establishing the Agricultural Experiment Stations, and by the Smith Lever Act in 1914, creating the Agricultural Extension Service. C. KERR, THE USES OF THE UNIVERSITY 51-52 (1964).

Tennessee State University is a Land Grant Institution receiving federal funds under the Morrill Act, Smith Lever Act, and other federal acts. *Catalogue* 23, 245, 249.

[39] Loans under the National Defense Education Act of 1958, 72 Stat. 1580, as amended (codified in scattered sections of titles 20 and 42 U.S.C.), are available to Tennessee State University students as a part of this aid. *Catalogue* 32.

the following contentions: (a) a university should not be forced, because of specific constitutional requirements, to formulate specific, *internal* regulations, since such a "legislating" function is foreign to the University; and (b) it should not be subjected to *external* regulation, *e.g.*, federal requirements, since that also will disturb the high functions of the University.

Let us examine how one applies for federal grants with these two assertions in mind.

But if a professor desires to conduct a research project, he must deal with at least two separate sets of regulations—the internal regulations and those externally imposed by the agency from which funds may be obtained:

(i) *Internal* regulations promulgated by the University.

For example, if a professor needs funds to support research, Section 4.06 of the *Faculty Manual* requires that the professor discuss the details of both the proposed project and the agency from whom the funds are sought with his Department Head, the Dean of his particular School, the Dean of the Faculty, and the President of the University. This discussion must take place before any commitment to the project, agency, or otherwise is made.

If the particular project in which the professor has shown interest requires the use of the Computer Center at Tennessee State University, there are detailed University regulations with which the professor must comply before he can obtain computer time and use. *Faculty Manual* § 7.4. The professor starts with a request to use the Center; forms are then sent to him which he must fill out and completely and correctly and return before his application will

be considered. *Id.* at § 7.4b. Once the forms are returned to the Center, the director is to review the forms and determine whether the requested computer time will be classified as "Internal or External Time." *Id.* at § 7.4b3. Time that is classified as "External Time" requires that the professor or director of the research project make arrangements through the Business office of the University for fee-payment for the use of the computer time. *Id.* Once these arrangements are made, the Computer Center Director and the professor or project director will, together, arrange a time schedule for using the computer facilities in the research project. *Id.* at § 7.4b4.

There are similarly detailed regulations specifying the procedures and conduct of faculty members with respect to obtaining Grants-in-Aid for Advanced Study for Staff Members. *Id.* at § 4.07.[40]

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[40] Other Universities have similarly detailed *internal regulations.* At the University of Wisconsin, for example, if a professor needs funds to support research, he must carefully follow the procedures enumerated in a University publication entitled SOLICITING AND ADMINISTERING EXTRAMURAL SUPPORT (Guidelines on Soliciting and Administering Extramural Support; Contract, Grant and Gift Supported Research, Training, Construction, Conferences, Institutes, etc.; November 1, 1965; The University of Wisconsin). This document covers over 20 separate details with which the professor must comply when he is applying for funds.

If the proposed project requires any change in currently assigned facilities, the professor must obtain and fill in a University Form UW-SR1 (GUIDELINE ON SPACE AND REMODELING REQUESTS; POLICY AND PROCEDURE ATTENDANT TO APPLICATION, EVALUATION AND PROCESSING; 1 August 1966; The University of Wisconsin). This booklet is a highly detailed document which contains instructions like:

> NOTICE: The UW-SR1 form distribution described here and the illustrated form on p. 14 are of the newly revised form.
>
> Until the present supply is exhausted, would you please prepare two sets of the existing form.

(*continued on next page*)

(ii) *External* regulations imposed by the Federal Government.

After complying with these internal regulations, the professor must turn next to the external regulations—those of the agency from which he wants funds. The Department of Health, Education and Welfare, has funded about 29% of the grants received by American Universities. *C. Kerr, The Uses of the University* 53 (1964). One of its divisions, the Public Health Service has 13 separate documents which a professor must fill out or read before he obtains the grant, furnished under the title *Department of Health, Education, and Welfare, Application for Public Health Service Grant or Award* (herein cited as *HEW Application*).

(This will give you 2 pink, 2 white, and 2 yellow copies to use in place of the revised set of 3 pink, 1 yellow and 1 white.)

On page 14, you will note that the revised form is identified on the bottom right hand corner by "Rev. 5-66".

There are 12 pages of detailed instructions which explain how to fill in Form UW-SR1. The professor must be careful to submit this form according to the schedule on page 2 of SPACE AND REMODELING REQUESTS or he may find that his project, although funded, has not met the requirements of the Space and Remodeling Policies Committee.

After complying with the UW-SR1 form, the professor must return to the 20-page GUIDELINE ON SOLICITING AND ADMINISTERING EXTRAMURAL SUPPORT. He then must fill out a Transmittal Form. This form must be received and approved by the Departmental Chairman, Dean, Chancellor, and the Transmitting Officer. This form has its own deadline (independent of the deadline schedule for Form UW-SR1) which is twenty days prior to the Federal Agency's deadline.

These publications and those cited *infra* p. 33, n. 7, are among the materials judicially noticed in *Soglin* v. *Kauffman*, pp. 21-22, *supra*. They are in the library of the Court of Appeals for the Seventh Circuit.

The Public Health Service Grants are governed by 42 C.F.R. Parts 52, 53, 57, 61, 63, and 64. Part 52 alone contains over twenty-three separate sections within five major sub-parts. There are seven different forms and over twenty copies which must completed. In addition, the professor must be aware of the Changes in Deadline Sheets[41] and Errata Sheets[42] which accompany each form. For example,

> *Page 1, item 2, Typing and Assembly*—Applications should be collated into five complete sets, rather than 4 complete sets and one set of printed pages only.[43]

B. Relations With the State and the Functions of the Non-University Respondents.

The University is operated under the control of the respondent State Board of Education, *Tenn. Code Ann.* § 49-3213, and of course receives substantial share of its budget from the State of Tennessee.

The State Board of Education has, by statute, plenary power over the University (there being no statutory delegation of authority to the University administration). A compilation of the statutory powers, duties, and authorities of the Board and respondent Commissioner of Education is included as an addendum to this brief. This compilation shows that regardless of what view one takes of the function of the University, there are no "ivory tower" overtones involved in considering whether these governmental agencies should be required to write its regulations with specificity. Regulating in detail is their business.

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[41] HEW Application, *Notice, Change of Deadlines.*

[42] HEW Application, *Errata Sheet—Changes in Instructions for Completing Form PHS-398 (Revised 1/65).*

[43] *Id.*

Whether made by the President or his superiors, the decision to be vague and unspecific should be understood as a policy decision. It should be evaluated as legislation. The Legislature has invested the respondents Commissioner and State Board with regulatory power. This power, whether or not further delegated to the University, should be exercised in conformity with the same constitutional standards as required of the Legislature. The state cannot avoid constitutional restraints by filtering the rule-making process through several levels. The administrators are subject to the vicissitudes of appointive politics, and they, the Board, and Commissioner, with an eye to the annual legislative appropriation, may feel called upon to retain arbitrary power to check any campus activity that might offend their benefactors.[44]

C. Connections with the Private Sector.

The unarticulated premise of the district court's opinion is that the University should be free from "the exigencies of the market place." This image of insulation is a necessary premise to the conclusion that constitutional principles applicable to other governmental agencies (whose business is involvement with private individuals and groups) should be inapplicable here. Yet Tennessee State University does not bear this image of isolation. The University encourages and actively seeks involvement in the "outside world," in the private sector of society. When

[44] And the Governor (also a respondent), to whom they owe their appointments, is, according to current news reports, very much trying to be in the business of regulating campus expression. See "Gov. Buford Ellington Bans Disloyalty, But None Found." Atlanta *Journal & Constitution*, Nov. 2, 1969, at 2-D, cols. 2-4:

> The governor, in issuing his prohibition against disloyal talk on the campus did cite one alleged example . . .

an individual accepts appointment to the faculty of Tennessee State University he also accepts and pledges his personal efforts to fulfill:

> The obligation to accept responsibility for performing certain public services. Serving as professional consultants for outside institutions and agencies by invitation is an illustration of one type of public service. *Faculty Manual* § 4.01r.

The thread running through all of the University's "academic" activities is job training. See pp. 24-25 *supra*. Consider also the mandatory placement service, the Agricultural Extension Service, and the testing bureau, p. 23 *supra*.

The picture is no longer one of academic or agricultural-industrial man.[45] There are extremely few of the former

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[45] Other state universities have undertaken an even more ambitious program of services and interaction with the private sector. The University of Wisconsin, for example, has created and maintained a University-Industry Research Program to render services to industry. See, *e.g.*, (a) THE UNIVERSITY OF WISCONSIN, UNIVERSITY-INDUSTRY RESEARCH PROGRAM, KNOWLEDGE FOR WISCONSIN SOCIETY UIR; (b) UNIVERSITY OF WISCONSIN, UNIVERSITY-INDUSTRY RESEARCH PROGRAM, INFORMATIONAL SERVICES DIVISION; (c) THE UNIVERSITY OF WISCONSIN DIRECTORY OF RESEARCH FACULTY IN ENGINEERING, MATHEMATICS AND PHYSICAL SCIENCES 1968, UNIVERSITY-INDUSTRY RESEARCH PROGRAM, GRADUATE SCHOOL; (d) THE UNIVERSITY OF WISCONSIN DIRECTORY OF RESEARCH IN THE BIOLOGICAL SCIENCES 1964, UNIVERSITY-INDUSTRY RESEARCH PROGRAM, GRADUATE SCHOOL. Through this program, the University of Wisconsin has according to these published materials, recently (1) developed an automatic seam tracker to guide welding machines for a firm, Milwaukee's A. O. Smith Corp., in the automotive business; (2) donated a hybrid computer to aid in designing a hydrofoil boat; (3) lent specialized research equipment in the College of Engineering to improve a company's vacuum-sealed electrical switches.

remaining. There are many "full-time" university staff members doing only outside research. Faculty members serve as consultants to the private sector. Such service is one of Dr. Kerr's "uses" of the University. *Kerr, supra* at 42-44.[46]

Although federal regulations may not be involved, the internal regulations of Tennessee State regarding private grants remain the same.

D. THE UNIVERSITY AS A MUNICIPALITY.

The central purpose of the 1862 Morrill Act, 12 Stat. 503, 7 U.S.C. §§ 301-05, 307, 308 was to create colleges and universities responsive to the public. The purpose of the land grant college was not to be an ivory tower, an isolated island of instruction, but rather to interact, to combine with, and be an integral part of the activities of the state and the nation.

Tennessee State University is a Land Grant institution. *Catalogue* 23. It functions for the state as an agency of state government and also provides municipal government-like services to campus community. See the examples at p. 23 *supra*.

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[46] See also J. K. GALBRAITH, THE NEW INDUSTRIAL STATE, 282, 291-92, 370-71 (1967).

> Most directly nurtured by the industrial system are the educators and scientists in the schools, colleges, universities and research institutions. They stand in relation to the industrial system much as did the banking and financial community to the earlier stages of industrial development. *Id.* at 282.

E. The Particular, But Not So Particular, Characteristics of the Negro University.[47]

A generation after the Civil War the southern states began to establish "Agricultural", "Industrial", "Technical", and/or "Normal" institutions to train Negroes to take their place in the segregated society. Trustworthy overseers were installed to keep order and mete out sub-professional training for useful but intellectually undemanding occupations and of course to produce Negro teachers for the Negro schools so the cycle could remain closed. Negroes, thought to be intellectually inferior, and at all costs to be kept socially and economically inferior, were not to be ex-

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[47] The historical facts and conclusions in this subsection are a composite from the following sources, all hereinafter cited by author's or editor's name: H. M. Bond, The Education of the Negro in the American Social Order (1934); H. A. Bullock, A History of Negro Education in the South (1967); Crosby, *New Directions in Educating the "Disadvantaged,"* in Higher Education for the Disadvantaged 21 (1968); Higher Education Among Negroes (T. McKinney ed. 1932); D. Matthews and J. Prothro, Negroes and the New Southern Politics 412-25 (1966); E. McGrath, The Predominantly Negro Colleges and Universities in Transition (1965); 2 G. Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (3d ed. 1944); C. G. Woodson, The Mis-Education of the American Negro (1933); Graham, *The Hampton Institute Strike of 1927, A Case Study in Student Protest,* 38 Am. Scholar 668 (1969); Jencks & Riesman, *The American Negro College,* 37 Harv. Educ. Rev. 3 (1967).

See E. M. Morgan, Basic Problems of Evidence 360 (1962): "in most instances the historical fact is a subject of judicial notice"; *accord, Morris* v. *Harmer's Heirs' Lessee,* 32 U.S. (7 Pet.) 554, 558 (1833). The judicial use of southern history in the racial context is illustrated by *United States* v. *Louisiana,* 225 F. Supp. 353 (E.D. La. 1963), *aff'd,* 380 U.S. 145 (1965). See *United States* v. *Mississippi,* 229 F. Supp. 925, 998 (S.D. Miss. 1964) (dissenting opinion), *rev'd,* 380 U.S. 128 (1965).

posed to the abstractions of liberal arts or the economic benefits of education for the professions.[48]

This early Negro education has been termed an "experiment," to determine

> whether or not millions of Negro Americans could be trained to function effectively as a caste in a society that would otherwise be democratic, and whether or not they could be made to remain satisfied with their condition. *Bullock* 167.

Above all, the beneficiaries of this higher training, as the future leaders of the subservient race and the future overseers of the training of succeeding generations, were to have instilled in them those values which would preserve the status quo. At the pinnacle of these values is blind obeisance to authority—regardless of the legitimacy of that authority it is "sacrosanct". (see A. 117-18.)[49]

Literal compliance with the thirteenth amendment demanded new forms if the attributes of slavery were to be retained;[50] the southern white was not lacking in initiative. Standing at the opposite pole from these values are the

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[48] See CROSBY. 22-23; MCGRATH 11, 72-73; MYRDAL 889-90; WOODSON *passim;* Jencks 19, 29. The small professional cadre was (and is) more likely to have come from the private Negro universities not included in this analysis.

[49] At this Negro university disrespect for authority is said to be more serious than gambling, smoking marijuana, participating in a panty raid, or possessing a chain to be used as a weapon (A. 117-18). When disrespect for authority was compared with grand larceny the Dean was not "prepared to answer that" (A. 118).

[50] Minimal literal compliance of course is not sufficient. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 872-73 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389

principles of the first amendment. See, *e.g.*, *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957).

Carter G. Woodson summarized the situation:

> The main difficulty with the education of the Negro, however, is that it has been largely imitation. Somebody outside of the race has desired to do with Negroes something which interested him and his co-workers; and Negroes, being objects of charity, have received them cordially and have done what they were required. In fact, the keynote in the education of the Negro has been to do what he is told to do. Any Negro who has learned to do this is well prepared to function in the American social order as others would have him. Woodson, *Twenty-five Years of Higher Education Among Negroes*, in McKinney, *supra* at 15, 22.[51]

Student dissent could not be tolerated; it "was regarded as a defect of character." Graham 670.[52]

As the record here shows, Tennessee A. & I. State University for Negroes has continued to run under the momen-

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U.S. 840 (1967); Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967). *Cf. Alexander* v. *Holmes County Bd. of Educ.*, 90 S. Ct. 29 (1969).

[51] See also MYRDAL 732, 889-90; WOODSON *passim*; Graham 671; Jencks 5, 7, 16-18, 21-23, 27.

[52] It is not the hundreds of dedicated Negro educators who are to blame for the problems—that they have done as well as they have under the pressures of white southern legislatures and boards of education attests to their fortitude. The pressure is clearly seen. *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966). See MATTHEWS 425; Jencks 17. The administrators need the aid of the federal courts to give them the freedom to allow student freedom.

tum of this legacy of slavery.[53] This heritage produces weird perversions of salutary principles and institutions: The President refers to his "academic freedom as an administrator"[54] (Booth F.A.C. 67); he is rigidly bound, even in day-to-day minutiae, by the rules of the school's accrediting agency, which rules are, he says, too arcane to disclose, summarize, or even discuss with lawyers and judges (A. 69-71). Concepts having no place in the university context come to the fore: The thoroughly discredited[55] *in loco parentis* doctrine pervades (the President refers to college students as "children") (A. 85; Booth F.A.C. 12); the President says that non-academic matters (guidance and rehabilitation) are "ninety percent of what the school is all about" (A. 86); faculty members are instructed to "take it upon themselves to educate the student body in the area of personal grooming, cleanliness and so forth" (A. 91).[56]

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[53] "[N]othing has been done to dismantle effectively the dual system so graphically illustrated by the enrollment at Tennessee A & I State University." *Sanders* v. *Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968) (Gray, J.) (ordering a plan of desegregation). The problems remain in other Negro universities. See BULLOCK 285; Jencks *passim*. Compare the pro-civil rights attitudes of Negro students found by MATTHEWS 413 with their expulsions for civil rights activities in *Dixon* and *Knight*.

[54] The faculty members who testified doubted the existence of much academic freedom for faculty and students (see A. 56-57, 90-91).

[55] See, *e.g.*, Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 292-95 (1968); Symposium, *Legal Aspects of Student-Institutional Relationships*, 45 DENVER L.J. 497-678 (1968).

[56] And seventy of its 4700 students are summarily dismissed at the year's end. But at the 30,000-student University of Texas a year produces only thirteen major alleged offenses. Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1083 (1969).

Jencks and Riesman, writing from the perspective of the Ivy League refer to the Negro college of the 1950's as a "caricature of white higher education," Jencks 21, or "perhaps it would be more accurate to say . . . a living reminder of how bad most white colleges in an earlier era had been—and a few still are," *id.* It is submitted, though, that McGrath is even more "accurate" in saying "each [Negro college and university] could be matched with another American college and university." *McGrath* 156. "Reflection" would be a more accurate term than "caricature." See, *e.g.*, the outrageous insensitivity to rights of expression displayed by the administrators of the white college in *Dickey* v. *Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom. Troy State University* v. *Dickey*, 402 F.2d 505 (5th Cir. 1968); the "blatant political censorship" by the university President in *Brooks* v. *Auburn University*, 296 F. Supp. 188, 194 (M.D. Ala.), *aff'd*, No. 27,316 (5th Cir. July 8, 1969) (court of appeals declining, however, to perceive the "censorship").[57]

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[57] The record in *Norton* v. *East Tennessee State Univ.*, No. 19,107 (6th Cir. argued June 9, 1969) (involving a white school) reveals the same atmosphere as that prevailing at Tennessee State University.

School administrators regardless of race, are peculiarly resistant to the demands of the Constitution. For example, 25 years after the *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943) the following appeared:

> The superintendent [of schools, Syracuse, N.Y.] said there has been a limited number of "recalcitrants" both black and white, who refuse to salute the flag during the mandatory, daily pledge of allegiance. Atlanta Journal, Dec. 3, 1968, at 4-C, col. 8 (AP dispatch).

3. *On the Nature of the University, Its Norms of Conduct, and Its Punitive Sanctions.*

The concepts of vagueness and overbreadth are most often applied in the criminal law. This is where society most directly proscribes conduct and provides severe penalties to enforce conformance to its norms. But the state also provides many non-criminal punitive sanctions to enforce conformance to these norms. Professor Amsterdam has noted that the vagueness doctrine:

> determines, in effect, to what extent the administration of public order can assume a form which, first, makes possible the deprivation sub silentio of the rights of particular citizens and, second, makes virtually inefficacious the federal judicial machinery established for the vindication of those rights.[58]

And the doctrines of vagueness and overbreadth in the area of the first amendment mediate between "*all the organs of public coercion of a state* and . . . the institution of federal protection of the individual's private interests."[59]

The point is that not only the criminal statutes of a state are subject to the substantive limitations on state power expressed in the vagueness and overbreadth doctrines. See *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966). One must look to (1) the nature of the governmental agency which promulgates, enforces, and adjudges violations of norms of conduct, (2) the nature of the conduct the state seeks to proscribe, and (3) the types of sanctions or pen-

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[58] Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960).

[59] *Id.* (emphasis added).

alties attached to violation of these norms. This must be done with a realization that substantive first amendment interests are the highest of safeguards to individual liberty.

a. THE NATURE OF THE GOVERNMENTAL AGENCY.

The University is not an "ivory tower of scholars," that might allow immunity to the restrictive protection of the first amendment. It is questionable whether Tennessee State University was ever intended to be such a "community". And full university involvement in the world around it may be praiseworthy.[60] But the "ivory tower" myth upon which a university may urge its exemption from the vagueness-overbreadth safeguard is but a myth.

Formulating standards and norms for the matters involved here requires no more "expertise" than dealing with like problems in the parallel community. And if application of these standards requires some expertise, the place to find it is the university, having at its disposal the combined knowledge of hundreds of scholars. "Expertise" is usually a criterion that relates an administrative agency to its fact-finding functions. But we are dealing here not with fact-finding, but with the formulation and articulation of standards, a business of the scholar. The ordinances of a small town are subject to no lesser constitutional standard than those of a metropolis. Yet the university's store of

[60] The American [university] system is particularly sensitive to the pressures of its many particular publics. Continental and British universities are less intertwined with their surrounding societies than the American and thus more inward-looking and self-contained. When "the borders of the campus are the boundaries of our state," the lines dividing what is internal from what is external become quite blurred; taking the campus to the state brings the state to the campus. C. KERR, THE USES OF THE UNIVERSITY, 26-27 (1964).

expertise and competence far outstrips that of the town council.

Universities comply every day with complex, pedantic, stringent legal requirements imposed by the federal government and its agencies.

The University has promulgated a detailed administrative code relative to faculty conduct, promotions, and relations with students. The University has formulated and published detailed regulations governing student activities. The disciplinary regulations, however, remain vague and overbroad.

The modern public university is hybrid. It is a municipality, a corporation, a school, and more. *Cf. Marsh* v. *Alabama,* 326 U.S. 501 (1946). It might be inappropriate for a federal court to interfere with the formulation of curricula,[61] a "school" function. But it does not follow that when the university is acting as a municipality—as a legislature, policeman, prosecutor, judge, and jury—it should not be required to perform substantially as must its other governmental counterparts. And that requires that the rules, regulations, practices and policies of the University governing non-academic student conduct, violations of which may result in dismissal, be tested by the vagueness and overbreadth concepts of the first and fourteenth amendments.[62]

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[61] But not necessarily entirely so, see, *e.g., Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

[62] Universities faced with unruly or violent student protests have not hesitated to announce their intentions to call in outside police. This is not an unreasonable reaction, but it is yet another step away from the university as an isolated entity, capable of solving its own problems without outside help. It is poor grace to invoke

b. THE NATURE OF THE NORMS OF CONDUCT.

Here a challenge to the University's authority to regulate academic performance is not involved. Nor is there involved the vagueness or overbreadth of rules concerning academics or the violation of regulations for which students are not subjected to serious penalties.[63]

The key protection of the vagueness doctrine is that the state must advise, *in advance*, what conduct will give rise to the imposition of penalties.[64]

The protection of the overbreadth doctrine is that the state may not, while regulating within its power, also restrict the exercise of first amendment rights. If a regulation is overbroad, it is stricken without regard to the activity of the individual involved.

There is far more to fear from the tyranny of improper state action than from the aberrant conduct of an individual. Hence the overbreadth doctrine frees the individual from the "imponderables and contingencies" of defending against charges under overbroad, general dragnet laws where form of speech may be imperiled. *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965).

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on the one hand the police power while pressing with the other the elitist notion that its students should not seek refuge in the courts and Constitution.

[63] We need not consider, for example, rules which could only result in the student being reprimanded or placed on probation. The complexities of whether one or more non-serious disciplinary sanctions, taken without constitutional safeguards, could serve as a partial predicate for later dismissal need not be dealt with. In any event there could be a clear delineation between rules providing severe non-academic penalties (*e.g.*, dismissal and other rules, once it is determined what penalties will be considered severe.

[64] The classic formulation is in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

"[T]he single most important principle in applying the Constitution should be that discipline cannot be administered on the basis of vague and imprecise rules." Wright, *supra*, 22 Vand. L. Rev. at 1063[65] The district court's result here is thoroughly criticized. *Id.* at 1060-66.[66]

Uncertainty as to the rules was found to have increased the difficulties during the troublous times at Berkeley in 1964, and to have been a "principal cause" of the recent troubles at Columbia. *Id.* at 1063.

c. THE NATURE OF THE PUNITIVE SANCTIONS.

As already noted, the sanction, dismissal from the University, is harshly penal.

> It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education [students] would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens. *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

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[65] The danger is cited that a university might proceed "indirectly" on some such ground as "bizarre clothes" against one who "expresses unpopular political views." One of the grounds of the complaint here was that these dismissals were motivated by the University's desire to suppress plaintiff's views (A. 10-11). The F.A.C. justified its dismissal of plaintiff Booth partially on its finding of how he "dressed himself" (Report of Findings and Decision, Exh. M to Complaint).

[66] Professor Wright goes on at 1066-67 to express doubt as to whether the overbreadth doctrine, as opposed to vagueness should apply. The question is purely academic for this case, as the regulations involved are hopelessly deficient under either term. He appears to be using a slightly different delineation between the terms than that used herein, pp. 45-46 *supra*. As a practical matter he is concerned with the "hard-core conduct" problem, a problem not present in this case as Jones' activity was pure speech.

B. First and Fourteenth Amendment Rights, Including the Right to Be Free of Vague and Overbroad Regulation, Are Available to Students. "It Can Hardly Be Argued That Either Students or Teachers Shed Their Constitutional Rights to Freedom of Speech or Expression at the Schoolhouse Gate." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 506 (1969).

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself, and *all of its creatures—Boards of Education not excepted.* These have, of course, important, delicate, and highly discretionary functions, but *none that they may not perform within the limits of the Bill of Rights.* That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 637 (1943).

The recital, in *Tinker* v. *Des Moines School District*, 393 U.S. 503, 505-07 (1969), of the history of the first amendment in the schools led to:

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. 393 U.S. at 511.

And:

> Under our Constitution, free speech is not a right that is given only to be circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in *carefully restricted circumstances*. 393 U.S. at 513 (emphasis added).

Freedom from blunderbuss regulation has never appeared to be other than one of the "fundamental rights which the State must respect." Nor are the vagueness and overbreadth doctrines strangers to the campus. This Court has time and again held the states to stringent standards of specificity in the teachers' loyalty oath cases. See, *e.g.*, *Whitehill* v. *Elkins*, 389 U.S. 54 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961).

In a series of quite recent cases the district courts, in a surprising show of unanimity, have brought the vagueness doctrine to the campus to invalidate restrictions on outside lecturers. *Smith* v. *University of Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969); *Brooks* v. *Auburn University*, 296 F. Supp. 188 (M.D. Ala.) *aff'd*, 412 F.2d 1171 (5th Cir. 1969); *Stacy* v. *Williams*, No. WC 6725-K (N.D. Miss. Jan. 14, 1969) (3-judge court); *Snyder* v. *Board of Trustees*, 286 F. Supp. 927 (N.D. Ill. 1968) (3-judge court);

Student Liberal Federation v. *Louisiana State University*, Civ. No. 68-300 (E.D. La. Feb. 15, 1968); *Dickson* v. *Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968) (3-judge court).[67]

These cases recognize that the appropriate question is not whether it is a civil or criminal sanction involved, but whether the state or the university[68] was regulating in the first amendment area.[69] This is reasonable—the first amendment says "no law," not "no criminal law." It is in accord with the decisions of this court. See *Schneider* v. *Smith*, 390 U.S. 17 (1968); *United States* v. *Robel*, 389 U.S. 258 (1967);[70] *Aptheker* v. *Secretary of State*, 378 U.S. 500, 516-17 (1964). The Court was explicit in *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966):

> Both liberty and property are specifically protected by the Fourteenth Amendment against *any state deprivation* which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct

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[67] To the same effect, see *Buckley* v. *Meng*, 35 Misc. 2d 467, 230 N.Y.S. 924 (Sup. Ct. 1962).

[68] *Brooks* involved purely internal university policy. In *Snyder* administrative regulations were struck down along with the statute. 286 F. Supp. at 936.

[69] Vagueness and overbreadth doctrines require that regulations "not deter by threat of regulation or punishment the exercise of protected speech . . . ." *Brooks*, 296 F. Supp. at 194. These doctrines apply to state's method "for regulating the exercise of First Amendment freedoms . . . ." *Snyder*, 286 F. Supp. at 936.

[70] *Schneider* and *Robel* illustrate the fallacy of refusing to apply the doctrines based on a policy of not burdening cherished institutions, for these cases strongly rejected any implication that considerations of national defense necessitated any invasion of the first amendment area.

> or its statute. So here this state Act, whether labeled "penal" or not, must meet the challenge that it is unconstitutionally vague. (Emphasis added.)

The Seventh and Eighth Circuits have recently split on the question of whether vagueness-overbreadth doctrines apply for students. *Compare Soglin* v. *Kauffman*, No. 17,427 (7th Cir. Oct. 24, 1969), *aff'g* 295 F. Supp. 978 (W.D. Wis. 1968), with *Esteban* v. *Central Missouri State College*, No. 19,565 (8th Cir. Aug. 28, 1969), *aff'g* 290 F. Supp. 622 (W.D. Mo. 1968).[71]

In *Soglin* the district court and the court of appeals squarely applied the constitutional principles of vagueness and overbreadth to university regulations.

The ten student plaintiffs in *Soglin* sought declaratory and injunctive relief that certain regulations of the University of Wisconsin at Madison were unconstitutional on their face or as applied.[72] The district court held, and the

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[71] In two other cases the district courts have alluded to the question. In *Buttny* v. *Smiley*, 281 F. Supp. 280 (D. Colo. 1968), the court indicated that the vagueness doctrine might apply, 281 F. Supp. at 284, but provided little discussion of why and to what extent, or why the "hazing" rule at issue was not invalidated. In *Hammond* v. *South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967) (cited with approval in *Tinker* v. *Des Moines School District*, 393 U.S. 503, 512 n. 6, 513 (1969), the court cast its invalidation of an overly broad regulation on student demonstrations in terms of "prior restraint." 272 F. Supp. at 950. Because the rule was held facially invalid, the "nature of the demonstration" was not examined. *Id.*

[72] The regulations stated a plenary guarantee of first amendment rights with the proviso: "They may support causes by lawful means which do not disrupt the operations of the University, or organizations accorded the use of University facilities." 295 F. Supp. at 983. Declaratory and injunctive relief was also sought

Court of Appeals agreed, that "misconduct" as a disciplinary standard violates the first and due process clause of the fourteenth amendments "by reason of vagueness and overbreadth." Slip opinion at 3.

Determination of the facial constitutionality *vel non* of the rules was held to be the appropriate first point of inquiry,[73] and:

> The thrust of cases such as *Dombrowski* lies in their attempt to counteract the "chilling effect upon the exercise of First Amendment rights" which may result from the very fact of prosecution. *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965). Administrative sanctions as harsh as those available to the University in this case, as well as criminal statutes, serve to chill the exercise of free speech. It is accordingly immaterial that this controversy involves a disciplinary rule rather than a criminal statute. Slip opinion at 4-5.

And, "turning to the merits," slip opinion at 5, the court made some observations about the university's "inherent authority" that should be self-evident but nevertheless are contrary to the universities' contentions both here and in *Soglin*:

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with respect to disciplinary proceedings based upon alleged "misconduct." Both standards were invalidated by the district court, 295 F. Supp. at 993-94; only the "misconduct" holding was appealed.

[73] This procedure also allows substantial judicial economy, as it allowed the case to be decided on the pleadings. The principle of avoiding constitutional questions where possible would not, either here or in *Soglin*, indicate a different procedure because the second contention is that the rules are unconstitutional as applied.

> They argue that "misconduct" represents the inherent power of the University to discipline students and that this power may be exercised without the necessity of relying on a specific rule of conduct. No one disputes the power of the University to protect itself by means of disciplinary action against disruptive students. Power to punish and the rules of defining the exercise of that power are not, however, identical. Power alone does not supply the standards needed to determine its application to types of behavior or specific instances of "misconduct." As Professor Fuller has observed: "The first desideratum of a system for subjecting human conduct to the governance of rule is an obvious one: there must be rules." Fuller, *Law and Morality*, p. 46 (2d printing, 1965). *Id.*

Esteban v. *Central Missouri State College*, *supra*, is to the contrary,[74] as is the same district court's *General Order*, *supra*, 45 F.R.D. 133, 146-47 (W.D. Mo. 1968). Judge Doyle in *Soglin* refers to the *Esteban* district court's citation of only one obscure reference work in support of its proposition, and no case law, and states: "I cannot agree that uni-

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[74] The *Esteban* district court does qualify its holding, leaving open the possibility of "exceptional circumstances." 290 F. Supp. at 630; 45 F.R.D. at 146. Perhaps a university or class of universities with a State-enforced history of suppression of dissent would be "exceptional." The history and current practice here should at any rate carry the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view while permitting the dominant opinion. *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 526 (1969) (Harlan, J. dissenting).

The Eighth Circuit likewise hedges: "We do not hold that any college regulation, however loosely framed, is necessarily valid." Slip opinion at 23. A regulation framed more "loosely" than those at issue here would be so loose it would have fallen apart.

versity students should be deprived of these significant constitutional protections on so slender a showing." 295 F. Supp. at 990. Similarly, the Court of Appeals for the Seventh Circuit explicitly declined to follow *Esteban*. Slip opinion at 7.

On precedent, on constitutional principle, and on policy analysis, the *Soglin* rationale should be preferred to that of *Esteban*. One of the reasons for the narrowness of view in *Esteban* is the failure to evaluate the nature and role of the public university today and to distinguish among its functions.[75]

C. Assuming Any Degree of Application of the Doctrine, Regulations Prohibiting "Disrespect for University Authority" and "Any Other Infractions of Standards of Conduct That Require Severe Disciplinary Action" Are, on Their Face, Unconstitutionally Vague and Overbroad.

Even if the doctrines of overbreadth and vagueness applied in relaxed fashion "disrespect for authority" and "any other infractions of standards of conduct that require severe disciplinary action" are so grossly vague, so exceedingly broad, that they must fall. As the facts here show involvement of first amendment rights cannot be ignored. The regulation may not be allowed to sweep in protected activity. *E.g.*, *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966); *Cox* v. *Louisiana*, 379 U.S. 536, 552 (1965).

[75] Another of the reasons is failure to carefully analyze first amendment-related facts (*cf. Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 578 (1968)), and misunderstanding of the nature and purpose of the constitutional doctrines of vagueness and overbreadth, as well as the function of the Civil Rights Act. See Circuit Judge Lay's dissent, slip opinion at 24-37.

It is not permissible to "presume that the statute curtails constitutionally protected activity as little as possible." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963). It is only "possible" misapplication that need be evident. *Id.*

The F.A.C. is unconstitutionally "license[d] . . . to create its own standards in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937).

Only the most Kafkaesque logic could support "[a]ny other infractions of conduct that require severe disciplinary action" as a definition of an offense.[*]

"Disrespect for University authority" being less absurd is more pernicious. There have been few students who never complained of a teacher or administrator—the rule

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[*] Or perhaps the problem is more "Carrollesque":

> "There's glory for you!"
>
> "I don't know what you mean by 'glory,'" Alice said.
>
> Humpty Dumpty smiled contemptuously. "Of course you don't—til I tell you. I meant 'there's a nice knock-down argument for you!'"
>
> "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.
>
> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."
>
> Alice was too much puzzled to say anything. . . . *L. Carroll, Alice's Adventures in Wonderland* 198 (Airmont ed. 1965).

When the President of the University was asked "When you say due process . . . what do you mean by this?" he replied, "I mean anything due process involves" (A. 76).

is a *carte blanche* authorization to dismiss most of the student body."[11]

The emphasis on respect for the sake of respect, rather than for the quality of the person or thing respected, appears as one of the relics of slavery remaining in the training of Negroes. See pp. 40-44 *supra*.

"Disrespect for University authority" does not "reasonabl[y] regulat[e] in carefully restricted circumstances." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513 (1969).

"University authority," from the Governor[12] through the football coach[13] cannot constitutionally be insulated from criticism. Criticism is often disrespectful, particularly as seen by its recipient.

II.

The University Violated Its Student's Right to Freedom of Speech, as Guaranteed by the First and Fourteenth Amendments by Applying Its Regulations to Dismiss Him for Handing Out a Leaflet. This Activity Should Be Governed by the Clear and Present Danger Test.

"The essentiality of freedom in the community of American universities is almost self-evident." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) (referring to freedoms of "teachers and students"). It is also evident that uni-

[11] The peaceful wearing of a black armband in protest of war may well be considered disrespectful by the members of the Department of Aerospace Studies.

[12] *Dickey* v. *Alabama State Bd. of Educ.*, *supra*, 273 F. Supp. 613.

[13] *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 154-55 (1967).

versities, particularly this University, do not all subscribe to this "essentiality." [50]

If a student can be suspended for handing out a leaflet,[51] his expression is less protected in his milieu than is expression in a park,[52] the state capitol grounds,[53] a bus station,[54] a privately owned town,[55] a shopping center,[56] or probably even a library.[57]

Again and again *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969) stated that students *do* have strong first amendment rights. It measured those high school students' rights against the "material and substantial interference" standard of *Burnside* v. *Byars*, 363 F.2d 744 (5th Cir. 1966). This was sufficient to vindicate their wearing of armbands.

The same standard is sufficient to vindicate Jones' handing out of his leaflet. Nothing either "material" or "sub-

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[50] [A]t [large] public universities attempts to establish student freedom have not yet been consummated.

Evidently, student academic freedom is neither practiced nor advocated to an unusual extent in the smaller public universities . . . . E. Williamson & J. Cowan, The American Student's Freedom of Expression 155-56 (1966).

[51] This being done in the face of the numerous cases affording universal protection to leaflet distributions. See, *e.g.*, *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Schneider* v. *New Jersey*, 308 U.S. 147 (1937).

[52] *See Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

[53] *See Edwards* v. *South Carolina*, 372 U.S. 229 (1963).

[54] *See Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968).

[55] *See Marsh* v. *Alabama*, 326 U.S. 501 (1946).

[56] *See Amalgamated Food Employees* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

[57] *See Brown* v. *Louisiana*, 383 U.S. 131 (1966).

stantial" happened. Months passed before the University even complained.

By *Tinker's* own terms, Jones has even stronger protections available to him:

> But we do not confine the permissible exercise of First Amendment rights to . . . the four corners of a pamphlet . . . . 393 U.S. at 513.

Jones did confine his activity to "the four corners of a pamphlet." The least immediate incitement to disorder is the written word. Men do read and act but rarely with immediacy.

Nowhere in the record is there any but the vaguest "undifferentiated fear or apprehension of disturbance," *id.* at 508, of University functions."

The leaflet that so offended the administration was apparently born of the frustrations of Negro education, described pp. 40-41 *supra*. It was written perhaps crudely and inartfully, but with obvious feeling, by a student seeking that which the word "education" means to at least one Negro educator: "freedom to challenge and to demand an equal share in America . . . ." Crosby, p. 47 *supra* at 24.

Tinker's strong language should establish the first amendment rights of students. It would surely do so with hardly any need for recourse to the courts if conscientiously ap-

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[*] At most the University can point to the President's testimony that the leaflet was "inflammatory" (T. 245), intended to "get students all stirred up and not wanting to register" (T. 247) and was generally "harmful" (*id.*). Even this "undifferentiated fear" was not expressed until the district court hearing, if the D.A.'s relied on it they were going outside their record, (as they undoubtedly must have, see p. 76, *infra*).

plied by administrators sensitive to the spirit of the first amendment.

But it has not done so.

A single phrase may be seized upon, divorced from the spirit of the opinion, and exploited by those who would avoid the teaching of the case. The phrase: "any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . ." 393 U.S. at 514.

This harks back several steps behind the now largely discarded "balancing test." If the test were simply "material and substantial interference" we would have a degree of protection considerably short of "clear and present danger" but at least not as amorphous as an *ad hoc* balance.

But the reasonable "forecast" by school authorities blueprints a "nip it in the bud" technique for wiping out the rest of the opinion. The school officials act so early that nothing is clear let alone dangerous. Thus the consequences of the students' words or proposed action remain unknown. They testify that, based on their experience and expertise, substantial disruption can "reasonably" be forecast.[*] This testimony is given in the best of faith since it is the ingrained administrative response to deviations from routine.

[*] See, e.g., *United States v. Robel*, 389 U.S. 258, (1967); *Wood v. Georgia*, 370 U.S. 375 (1962).

[*] Actually it is not even necessary to act early. Even after delayed action and no disruption an expert might plausibly say that the reasonable probability of disruption was present. The vice of the scheme is not prompt action per se, but that there is never a neutral or countervailing expert to pass on whether it was reasonably necessary in the particular situation.

This one-phrase reading of *Tinker* produces a standard quite different from the opinion's exposition of first amendment principles. The result is not the "reasonableness-due process test" opposed in Mr. Justice Black's dissent, 393 U.S. at 519, but a "reasonableness-first amendment test." And, most importantly, the "reasonableness" is not determined by the courts, but by one of the adversaries, and then only subjectively.[9]

In any event so long as the test includes value judgments whether made by judges or administrators, first amendment cases will be prey to the sort of unsatisfactory resolution which produce statements such as:

> The majority here states the principles of decision in those cases correctly. My difficulty with the majority's opinion is that while quoting the essential balancing rule from the *Burnside* opinion, it overlooks the failure of the district court to apply that rule. The district court here did not attempt to balance the competing interests of plaintiffs in the free exercise of their constitutional rights against Illinois interest in conducting and maintaining an orderly, effective school system. *Scoville* v. *Board of Education*, No. 17,190 (7th Cir. Sept. 25, 1969) (Kiley, J. dissenting, slip opinion at 4).

[9] Obviously, Jones does not contend that *Tinker should* be read on this one-phrase basis. He does contend that there is real danger that it *will* be so read. *Cf.* the first amendment outrages during the first World War cited in Emerson, *Freedom of Expression in Wartime*, 116 U. Pa. L. Rev. 975, 981 (1968). It would be equally logical to read the case on the one-sentence basis of "This provision [the first amendment] means what it says," 393 U.S. at 513, and find in it a heretofore unprecedented general license to talk. But this has not been done, for constitutional liberties contract, they do not expand as the distance of the speaker from this Court increases.

Whatever the effect of the narrowing phrase in *Tinker*, a symbolic speech, junior high and high school, inside-the-classroom case, it should not be in the first amendment jurisprudence of cases involving the pure written speech of university students[92] outside the buildings. The clear and present danger test should be made explicit.[93]

College students, no less than school children, can be taught by example "to discount important principles of our government as mere platitudes," *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 637 (1943). Additionally or alternatively, they may learn to turn away from established institutions and methods. See Schwartz, *Comment*, 45 Denver L.J. 525 (1969). Society has far more to fear from students nurtured under an oppressive "pall of orthodoxy"[94] than from the occasional discomfitures or even excesses that accompany our "profound national commitment"[95] to free expression.

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[92] The average age of college students being over 21, *Soglin* v. *Kauffman*, *supra*, 295 F. Supp. at 988, and substantially all of them being over 18 the question of whether "First Amendment rights of children are co-extensive with those of adults" is not involved. *Tinker* v. *Des. Moines School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J. concurring). There was no prior "order" defied or flouted and no distraction from "school work." *Id.* at 518 (Black, J. dissenting).

[93] It is noteworthy that the restrictions on distribution of leaflets at this University are greater than in the elementary and secondary schools of Philadelphia, where the only limitation on content is against

> material which is obscene according to *current legal definitions*; or which is libelous; or incites students so as to create a *clear and present danger* of the commission of unlawful acts on or of physical disruption to the orderly operation of the school. Philadelphia, Pa., Resolution of Board of Education, Sept. 30, 1968. (Emphasis added.)

[94] *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

[95] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

> [F]reedom of expression, far from causing upheaval, is more properly viewed as a leavening process, facilitating necessary social and political change and keeping a society from stultification and decay. *T. I. Emerson, Toward a General Theory of the First Amendment* 13 (1967).[26]

At Tennessee State University academic freedom is at a low ebb. This "leavening" is not allowed, and there is, if not "stultification," at least a chilling effect. The students are fearful of joining controversial organizations (A. 57-58) which, for them, includes the NAACP (A. 93).

III.

The Composition of the F.A.C., Its Methods of Inquiry, the Failure to Provide Adequate and Timely Notice, the Conviction of an Uncharged Finding, and the Availability of an Appellate Remedy Only From an Adverse Witness Denied Due Process.

A. Principles of Due Process for Students, the Alternatives Available, and the Uncharged Findings.

The due process rights of students have drawn from the cases as follows:

> The essential elements of fair procedure include (but may not be limited to) the following requirements:
>
> . . . . .
>
> (2) Where the rules are reasonably clear and their application does not depend upon uncontrolled discre-

[26] See also E. Williamson & J. Cowan, The American Students' Freedom of Expression 150-70 (1966); Mason, *Judicial Activism: Old and New*, 55 Va. L. Rev. 385, 406-10 (1969).

tion, a student still may not be seriously disciplined (as by suspension) unless:

(a) the student charged with an infraction has been furnished with a written statement of the charge adequately in advance of a hearing to enable him to prepare (*e.g.*, 10 days);

(b) the student thus charged "shall be permitted to inspect in advance of such hearing any affidavits or exhibits which the college intends to submit at the hearing";

(c) the student is "permitted to have counsel present at the hearing to advise [him]";

(d) the student is "permitted to hear the evidence presented against [him]," or at least the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies;

(e) the student or his attorney may question at the hearing any witness who gives evidence against him;

(f) those who hear the case "shall determine the facts of each case solely on the evidence presented at the hearing";

(g) "the results and findings of the hearing should be presented in a report open to the student's inspection";[27]

[27] This obviously presupposes that the findings will be meaningful, *i.e.*, they will tell the student exactly what he has been disciplined for. Presumably the University complied with this requirement. The findings as to all three plaintiffs contain language referable to specific charges followed by generalized language identical in all three cases. The acting Chairman of the F.A.C. first

(h) "either side may, at its own expense, make a record of the events at the hearing."

These procedural safeguards roughly parallel some of the standards required by criminal courts in their disposition of offenses punishable by fine or short term imprisonment. The comparison is not fortuitous because it is now evident that expulsion or exclusion from college may, in the long run, disadvantage an individual at least as much as a single infraction of a criminal statute. There should be no surprise, therefore, that students are entitled at least to a similar degree of due process as a suspected pickpocket. Van Alstyne, *The Student as University Resident*, 45 Denver L.J. 582, 592-95 (1968) (footnotes omitted; quotations are from *Esteban* v. *Central Missouri State College*, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967); and *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 159 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).[25]

Professor Van Alstyne's citations indicate that these standards are reasonably well established in the lower federal courts. There is contrary authority, though—the district court's opinion in this case is cited as being in opposition to (a) (adequate time to prepare), *id.* at 593 n.25, and as a substantial diminution of (f) (determine facts

testified equivocally (A. 119), and then that he did not remember whether matters not specified in the findings were basis for the suspensions (A. 119). He did testify that all findings were based on offenses listed in the *Handbook* (A. 119).

[25] The genesis of the pickpocket analogy is Seavey, *Dismissal of Students: "Due Process,"* 70 Harv. L. Rev. 1406, 1407 (1957), relied upon in *Dixon*, 294 F.2d at 158.

To the same effect as this compilation of rights, see *Joint Statement* § VI; *ABA Statement* art. IX.

solely on the evidence) in that the combination of prosecutorial and adjudicatory functions makes it doubtful that the decision is based solely on the evidence, *id.* at 594 n.30. Although not so apparent from the face of the opinion, it is also contrary to (b) (advance inspection of exhibits).

One of the parameters of due process is the availability of alternative procedures. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J. concurring). Here the University did not even follow its own required procedure[29] of bringing the charges before the Men's Senate (A. 43-44; *Handbook* 16). And of course no contention could be made that a disinterested panel could not be drawn from the hundreds of faculty[30] members and thousands of students at the University.

As to the F.A.C.'s supporting its dismissal upon the uncharged finding that Jones did not tell the truth at the hearing, the same principles that led to the second of the holdings in *In re Oliver*, 333 U.S. 257, 273-78 (1948) apply:

> [F]ailure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. *Id.* at 273.

Although Oliver's trial suffered the additional infirmity of being secret, Jones had no greater "opportunity to be heard", *id.* Since this right is "basic in our system of jurisprudence" there should be no distinction based on the fact

[29] But apparently an often ignored procedure (see A. 72-74).

[30] In fact, any distinction based on the nature of the proceeding might operate in Jones' favor, as *Oliver* was a contempt proceeding

that Oliver was a criminal case.[109] See also *Cole* v. *Arkansas*, 333 U.S. 196, 201-02 (1948).

Assuming any constitutional right to fair procedures in student disciplinary matters, this "untruth" finding is patently unconstitutional. The effect of this unconstitutionality should, by analogy to the principle of *Stromberg* v. *California*, 283 U.S. 359 (1931) be to taint the entire result. See also *Street* v. *New York*, 394 U.S. 576 (1969); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969); *Cole* v. *Arkansas*, 333 U.S. 196, 201-02 (1948).

Both of the findings—the uncharged untruthfulness and the distribution of leaflets after the initial unsupportable suspension—come suspiciously late. It is as if they were "invoked strictly as an afterthought"[110] or were based on "subsequent rationalizations of . . . counsel."[111]

in which procedural safeguards have historically been somewhat attenuated, see, e.g., *United States* v. *Barnett*, 376 U.S. 681 (1963).

[109] *Hadnott* v. *Amos*, 295 F. Supp. 1063, 1074 (M.D. Ala. 1968) (Johnson, J. dissenting), *rev'd*, 394 U.S. 358 (1969). Cf. the summary treatment of the school authorities' stated afterthought grounds for suspension in *Dixon* v. *Tatum*, 301 F. Supp. 60, 63 n.3 (N.D. Ala. 1969).

[110] *Trailways of New England, Inc.* v. *CAB*, 412 F.2d 926, 941 (1st Cir. 1969), citing *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962). Petitioners Reply Brief on Petitions for Writ of Certiorari herein was devoted largely to pointing out examples of "appellate counsel's post hoc rationalizations", 371 U.S. at 168, and their recasting of the facts.

B. Jones Was Deprived of Due Process in That the Members of the Tribunal Had Initiated, Investigated and Drawn the Charges and It Was Their Practice to Act Also as Witnesses, and the Reviewing Authority Was an Intensely Interested Party and a Sharply Controverted Witness.

In the present case the trier of fact was the same body that was also both the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal. . . .

Appellant requests us to reverse the state courts' decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court. . . . Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning as it did appellant. *Pickering v. Board of Education*, 391 U.S. 563, 578 n.2 (1968).

Here the "obvious defects" have been raised from the beginning.

Jones and the other plaintiffs were summarily suspended in June 1969, in the absence of a pressing need for suspension (this merely being the time of year when such things were done) without the first trapping of due process. This was a clear violation of *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S.

930 (1961); *Knight v. State Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961) (both cited approvingly in *Tinker v. Des Moines School District*, 393 U.S. 503, 508, n.2 (1969)). *Cf. Stricklin v. Regents of University of Wisconsin*, 273 F. Supp. 416, 420-423 (W.D. Wis. 1966), *appeal pending* No. 17,597 (7th Cir. argued Oct. 10, 1969) (approving as constitutional doctrine *Dixon Statement*, VI.C.).

control of going immediately into federal court, Jones and his co-plaintiffs tried to correct the error within the University. An entire term of school had passed before these efforts brought about the September hearings.

But when the students presented themselves at the hearings they found an essentially inquisitorial tribunal arrayed against them.

Even at the hearing the inquiry was premised on the *fait accompli* of suspension, the question being whether the students should be readmitted (i.e., not whether they should be suspended). Of course terminology is not determinative, but here it is significant because it accurately describes the situation. The onus of going forward with the evidence was on Jones and he was saddled with the burden of affirmatively proving his suitability as a student. The University understood the burden of proving that its

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[1] *Status of Student Pending Final Action*

Pending action on the charges the status of a student should not be altered, or his right to be present on the campus and to attend classes suspended, except for reasons relating to his physical or emotional safety and well-being or for reasons relating to the safety and well-being of students, faculty, or university property.

[2] The disciplinary dismissal had been noted on Jones' academic transcript on June 5th and remains a part of his academic record. (A. 178)

had violated valid standards of conduct. See *Lamberty v. Warden*, 380 F.2d 285, 551-52 (1965) (constitutional invalidity of hearing not cured by subsequent hearing in which, because of the earlier invalid determination, burden of proof is reversed); *In re Gault*, 387 U.S. 1, 32-33 (1967) (effective notice prior to first hearing not cured by second hearing); *Hulett v. Julian*, 250 F. Supp. 208 (M.D. Ala. 1966) (three-judge court) (defective trial scheme not cured by availability of de novo trial on appeal).

These inquisitorial methods, foreign to our system of justice, naturally partake of bias. The following words, although delivered in a different context (pertaining to coerced confessions), illustrate the pitfalls of departing from our fundamental jurisprudence:

> "There is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. . . . For while under [the inquisitorial] system the accused is subjected to judicial interrogation, he is protected by the disinterestedness of the judge, in the presence of counsel. . . .
>
> "In holding that the Due Process Clause bars judicial proceedings which violate the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such proceedings, we apply the Due Process Clause to its historic function . . . assuring appropriate procedure before liberty is cut

. . . [illegible] . . . [illegible] . . . [illegible] .

men are loyal to the obligation with which they are entrusted. *Id.*

But the "professional habits" of school administrators quite properly do not fit this description. The "obligation" to which they are "loyal" calls into play considerations which are quite different from, indeed usually the opposite of, the distancing process by which judges maintain their impartiality. For them it is even more

> true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. . . . The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact. *Id.* at 466, 467.[*]

The difference is that the President's feelings were far from "unconscious." And the P.A.C. members' feelings, particularly those of its acting chairman, about the necessity of respecting the President were quite "conscious."

In *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967), these ideas were taken to be self-evident:

> In substance Wasson charges that members of the panel had participated in the investigation against

[*] These principles have been codified. See, e.g., 28 U.S.C. § 455 ("any justice or judge . . . shall disqualify himself in any case in which he . . . has been a material witness . . . ."); Fed. R. Crim. P. 42(a)(3) ("If the contempt charged involves disrespect to or criticism of a judge he shall disqualify himself . . . .").

him. This combination of the functions of policeman and judge, he argues, resulted in a biased panel and, thus, the hearing was not fair. It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior *official involvement* in a case renders impartiality most difficult to maintain. . . . Wasson was entitled to show that members of the panel had had prior contact with his case that they could be *presumed*[11] to have been biased. (Emphasis added.)

A showing of actual prejudice is not customarily required where notions of fundamental fairness have been transgressed. See, *e.g.*, *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U. S. 145 (1968); *Chandler* v. *Fretag*, 348 U. S. 3 (1954); *Tumey* v. *Ohio*, 273 U. S. 45, 535 (1927) (unnecessary to discuss the facts of the case [11]), and cases cited nn. 108-109 *supra*.

[11] Citation is however available. See *e.g.*, *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U. S. 145, 147-49 (1968) (any tribunal must avoid even the appearance of bias); *id.* at 150, this "constitutional principle," *id.* at 148, applicable to non-court (arbitration) proceedings; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950); *In re Murchison*, 349 U. S. 133, 136 (1955) (citing the possible temptation to the average man of *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927)). The F.A.A.'s pre-hearing activities were akin to those of a grand jury. "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." 349 U. S. at 137.

[12] This presumption is consistent with the holdings of other courts of appeals. See *e.g.* *American Cyanamid Co.* v. *FTC*, 363 F. 2d 757 (6th Cir. 1966); *Amos Treat & Co.* v. *SEC*, 306 F. 2d 260 (D.C. Cir. 1962). In these cases, it was not necessary to establish actual prejudice; the commingling of functions was sufficient to taint the hearing.

Commentary on the district court's opinion on this point, too, has been critical. Professor Charles Alan Wright quotes from the district court opinion and comments as follows:

> "[L]imited combination by a school administrative body of prosecutorial and adjudicatory functions is not fundamentally unfair in the absence of the showing of other circumstances, such as malice and personal interest in the outcome of the case." [279 F. Supp. at 200] I agree that this procedure may not be fundamentally unfair but I wonder if it does not fail by the other test of reasonableness? When other alternatives are so easy, it seems quite unreasonable for the judge also to be a witness . . . . Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1080-81 (1969).

The testimony was generally that the F.A.C. stuck to the record of the hearings.[10] But the members were only human and they had been intimately and officially involved. The acting chairman, testifying in the district court, at one point acceded to this humanity and conceded that, "[i]n deliberation" and "[p]erhaps in discussion" the F.A.C. took evidence. (A. 122)

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[9] The court was here referring to the fact that two members of the F.A.C. testified against the plaintiffs. 279 F. Supp. at 200. This is technically correct only as to the other two plaintiffs although it is submitted that the court was approaching the problem correctly in considering issues of composition of the panel as being the same for all three plaintiffs. The appropriate question is the manner in which justice is being meted out at the University.

[10] Professor Wright's criticism would no doubt have been stronger had the President's involvement been alluded to in the opinion.

[11] *Cf. SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

The President's involvement is reminiscent of the problem of "command influence" in courts martial. See *Reid v. Covert*, 354 U.S. 1, 36 (1957). Because of various exigencies which do not (or should not) exist in academia, the military has been allowed to use courts martial not as "an independent instrument of justice" but as "a specialized part of the overall mechanism by which military discipline is preserved." *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969). The pervasive built in influence of the commander over the members of the tribunal is an unsolved problem. *Id.* at 264. The principal draftsman of the Uniform Code of Military Justice recognized that the Code was inadequate in this respect. See Morgan, *The Background of the Uniform Code of Military Justice*, 6 Vand. L. Rev. 169, 179, 183-84 (1953).[a]

Nevertheless, a troop commander would not be allowed to maintain the degree of involvement with the proceedings that the President has been allowed here.[b] See generally *United States v. Hedges*, 11 U.S.C.M.A. 642, 29 C.M.R. 458 (1960); *United States v. Littrice*, 3 U.S.C.M.A. 467, 13 C.M.R. 43 (1953).

See also the "impartial" pre-trial investigation required by UCMJ art. 32(a), 10 U.S.C. § 832(a), conducted by an

[a] Some adjustments have recently been made by the Military Justice Act of 1968, 82 Stat. 1335 (codified in scattered sections of the UCMJ, 10 U.S.C. §§ 801-940).

[b] The convening authority of a court martial, normally the commanding officer, also exercises intermediate post-trial review. UCMJ arts. 60(c), 10 U.S.C. § 860(c). But he is prohibited by UCMJ art. 22(b), 10 U.S.C. § 822(b) from being an "accuser," defined as the one who brings charges or "any other person who has an interest other than an official interest in the prosecution of the accused." UCMJ art. 1(9), 10 U.S.C. § 801(9).

officer who thereafter does not participate. See arts. 6(c), 26(d), 10 U.S.C. §§ 806(c), 826(d).

If methods which are beyond the pale even to the military are allowed in our universities, it is redundant to speak of the possibility "that expansion of military discipline beyond its proper domain carries with it a threat to liberty." *O'Callahan v. Parker*, *supra*, 395 U.S. at 265.

C. The Discretionary Proceedings Were Arbitrary, Depriving Plaintiffs Cause in That Notice Was Deficient as to Time and Information.

1. *Time of Notice*

All three of the plaintiffs' cases were treated as a single group. Two days to prepare for the first of three consecutive hearings on seventeen separate charges is absurd, considering that the action had been initiated some three months earlier.[9]

Regardless of whether application of due process principles results in a rigid standard (*e.g.*, 10 days' notice absent unusual circumstances) or a flexible case-by-case requirement of reasonableness, two days measured against the delay of three months is insufficient.[10] Of course if the University had not insisted on making the interim suspension

[9] The university has persistently claimed that the delay was caused by the offer of a continuance. The offer, though, did not include restoration of the pre-suspension status quo and had Jones accepted it he would not have been able to register at the beginning of the fall term. He had already missed the summer session because of the suspension; this seemed enough.

[10] A fairly rigid standard would seem preferable as less subject to abuse and less productive of litigation.

(which was also unconstitutional) the problem would not have arisen.

The additional evidence and proffers of evidence in the district court supply a showing of prejudice if such is needed.

In holding that the notice was timely, the district court relied on *Doe v. Florida A. & M. University*, 233 F. Supp. 396 (N.D. Fla. 1963). Although *Doe* does not appear to have been correctly decided (there was no advance notice of charges), such reliance is in any event misplaced because, unlike the intricate network of diverse and disputed accusations here, there were no factual disputes in *Doe*.

2. *Notice of Evidence*

If, as has been the practice and may be desirable, schools are not to be bound by detailed prosecutorial codes, "trial by surprise" has no place in disciplinary proceedings. In particular, copies of documentary evidence that served as the basis for the charges should be given the student. The authority upon which the action is founded (here certain regulations from the *Handbook*) should be pointed out to the student. And it is reasonable to let the student know, at least when the University knows, the testimonial evidence he is to face.

Some of this information was disclosed in advance. Some measure has yet not fully determined, of discovery is constitutionally required in other areas. See, e.g., *Giles v. Maryland*, 386 U.S. 66 (1967); *Jencks v. United States*, 353 U.S. 657 (1957). A reasonable approach to delineating the scope of the right is to consider the nature of the proceed-

ing. As the formality of the hearing decreases, the appropriateness of pre-hearing exchange of information increases.

As an alternative to considering the question in the context of discovery, it may be considered as an aspect of the requirement of specificity of charges. Either way the test should be to look at the quantum of information that has been made available to the student sufficiently in advance to allow him to prepare his defenses.

Both before the F.A.C. and in the district court a question came up that has no place in a system where reasonableness is supposed to prevail (A. 50-51, 101-02). Jones had either assumed or could reasonably have assumed that he was being disciplined for handing out Pl. Exh. 5 (A. 105) that the University insisted it was for (Pl. Exh. 6 (A. 175)). Instead of forestalling the problem by showing him the leaflet in advance, or simply attaching a copy to the charges, University counsel toyed with inconclusive results to show that Jones was not surprised that Pl. Exh. 6 was the subject of the charge.

Conclusion

The decision of the court of appeals (which reached on the district court's opinion) should be reversed and the case remanded to the district court for entry of an appropriate order (enforcing the status as it existed prior to the June 8, 1967 dismissal, enjoining further disciplinary proceedings against petitioner, and requiring expungement of all record of the dismissal. All issues raised herein and ignored in the district court's opinion should be decided

ADDENDUM

Powers, Duties, Authorities and Functions of Tennessee State Board of Education and Commissioner of Education as Provided in Title 49 of Tennessee Code Annotated

	Section of Tenn. Code Ann. Title 49
State Board of Education functions	
Administer the state's system of education (along with Commissioner and local superintendents and boards) including special schools such as kindergartens, those for exceptional and handicapped children, those for the blind and deaf, a fire college, and six colleges and universities	102 2303 2902 3005 3026 3104 3213 3218
Elect certain Supervisors in department of education	105(1)
Adopt regulations, including those for approval and classification of public schools, for teaching and other certificates (even prescribing standards different from those prescribed by statute), for instruction for the retarded, *for government of* and admission to *six colleges and universities,* prescribe curricula and approve courses including "adequate provision for the growth of . . . pupils in the skills basic to citizenship in American democracy"	105(5) 108 1234 1236 1237 1907 1908 1909 2907 2908 3213 3221 3224
Administer federal funds including urban renewal adjacent to colleges, enter into contracts with respect thereto with federal and local gov-	109 2701 2702

	Section of Tenn. Code Ann. Title 49
ernmental units, and authorize disbursement thereof	3223 3226 3227 3503
Act as board of vocational education	107 2701
Authorize leasing of public lands to fraternities and sororities	113
Establish tax-sheltered annuities	114
Issue certificates to teach and collect fees therefor	1232 1235 1238
Appoint advisory counsel to make continuing study of problems of teacher education and certification	1240
Approve or adopt "[a] treatise on the history and interpretation of the Constitution of the United States"	1907
Prepare detailed plans for vocational education	2703
Do whatever it deems necessary in the area of special education to establish and maintain classes, establish standards, curriculum and instructional methods, acquire facilities, equipment, and special personnel, and to assist local and other state agencies	2902
Establish scholarships for the professional education of Negroes at other (out of state) schools in subjects offered for white students by the University of Tennessee	3207 3208
Establish training and instruction for Negroes equivalent to that offered to whites by the University of Tennessee	3209

	Section of Tenn. Code Ann. Title 49
Prescribe nonresident tuition rates at state colleges	3211
Establish college ROTC	3214
Establish retirement plans for or pay retirement annuities to college employees	3216
Authorize municipalities to prescribe and enforce traffic ordinances on college campuses and to revoke such authorizations	3225
Establish standards for and confer university status upon institutions of higher learning	3229 3230
Establish foundations for colleges and universities	3232
Acquire (including acquisition by exercise of right to eminent domain), hold, and contract with respect to real and personal property	3503
Borrow money and issue bonds	3503(e) 3504 3505
Establish an educational television network	3801-07
Commissioner of Education functions	
Administer the state's system of education (along with State Board and local superintendents and boards), and see that school laws and regulations are executed	102 105(5)
Administer school laws	104
Chairman of State Board of Education, and Secretary of State Textbook Commission, Executive Officer of Board for Vocational Education, Member of Board of Trustees of University of Tennessee	105 2003 2702 3301

	Section of Tenn. Code Ann. Title 49
Appoint all personnel in the department of education except those elected by the State Board, and Supervise and direct all such personnel the department being comprised of four major divisions: certification, public libraries & archives, vocational rehabilitation, and vocational education	105(1) 110 111
Collect and publish school statistics and information	105(2)
Inspect and direct the supervision of public schools and supervise high schools	105(3) 105(16)
Require teachers to attend institutes	105(4)
Prescribe detailed annual reports from local school systems and from heads of state educational institutions, and provide forms for these and all other reports	105(6) 105(8) 105(9)
Print and distribute school laws	105(7)
Preserve official documents and other matters on education	107(10)
Make annual reports, including detailed report of all official acts, and average daily attendance	105(11) 105(12)
Prepare and furnish high school diplomas	105(13)
Receive evidence, provide opportunity for defense, and rule on revocation of certificate of teachers, principals, supervisors and other school officials	105(4)
Protect school funds and initiate investigations and recovery proceedings (including employment of private counsel) for school funds, and require bonds for handling thereof	105(15) 105(18)
Regulate display of flags	105(17)
Inspect, approve, and classify private schools	105(19)

	Section of Tenn. Code Ann. Title 49
Represent state in administration of federal school legislation	109
Issue temporary teaching permits	1234
Prescribe regulations and procedures for night schools and for the establishment and maintenance by local boards of programs for retarded children	2504 2909
Distribute funds for multiple handicapped children	3019
Establish training and instruction for Negroes equivalent to that offered to whites by the University of Tennessee	3209
Disbuse funds to colleges and universities in accordance with monthly statements therefrom	3215
Assist Board in establishing an educational television network	3801-07

Also the Board and Commissioner are charged with further duties in administering the annual appropriations and general education acts. This latter act for 1969 is 58 pages long. 1969 Pub. Acts of Tenn., ch. 294 (May 20, 1969). The educational appropriation of state funds (exclusive of that for the separately administered University of Tennessee) is over three hundred million dollars, including forty-four million dollars for higher education, of which $4,198,000 is allocated to Tennessee A. & I. State University. *Id.* and ch. 256.